IN RE ARBITRATION BETWEEN:

LAW ENFORCEMENT LABOR SERVICES, LOCAL 75

and

CITY OF WINONA, MINNESOTA

DECISION AND AWARD OF ARBITRATOR

BMS Case # 06-PN-0650

JEFFREY W. JACOBS

ARBITRATOR

October 6, 2006

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Law Enforcement Labor Services, Local 75,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case 06-PN-0650

City of Winona, MN.

APPEARANCES:

FOR THE UNION:

Chuck Bengston, Attorney for the Union

FOR THE CITY:

Chris Hood, Attorney for the City
Brandon Fitzsimmons, Attorney for the City
Joseph Hartens, Towers & Perrin

PRELIMINARY STATEMENT

The hearing in the above matter was held on August 22, 2006 in the Winona City Hall in Winona, Minnesota. The Union represents the police officers employed by the City of Winona. The parties presented oral and documentary evidence at which point the hearing was closed. The parties submitted Briefs postmarked September 6, 2006 and received by the arbitrator on September 7, 2006.

ISSUES PRESENTED

The parties were unable to resolve certain issues concerning the terms of the collective bargaining agreement and requested mediation from the Bureau of Mediation Services. Negotiation sessions were held and the parties negotiated in good faith but were ultimately unable to resolve certain issues with respect to the labor agreement. By letter dated February 15, 2006, the Bureau of Mediation Services certified 16 issues to binding interest arbitration pursuant to Minn. Stat. 179A.16, subd. 7.

These issues are as follows:

1. Duration - Article 37 – The parties resolved this issue prior to hearing and agreed that the contract will be a two-year agreement from January 1, 2006 through December 31, 2007
2. Wages – 2006 – Article 6
3. Wages – 2007 – Article 6
4. Shift differential for hours 6:00 PM to 6:00 AM – New
5. Uniforms Level of Allowance – Article 22
6. Court time- this matter was dropped by the Union at the hearing and it was agreed that the existing contract language shall remain in place for the duration of this agreement.
7. Court time – Advanced notice for Court cancellation – Article 12
8. Insurance – Level of contribution for 2006 Article 23
9. Insurance – Level of contribution for 2007 – Article 23
10. Compensatory time – cash conversion of Comp. Time – Article 10
11. Recognition – description of bargaining unit – Article 1
12. Rights and privileges and working conditions – Define terms and conditions of employment – Article 4
13. Employer rights – Define employer rights – Article 5
14. Shifts – Define shifts and shift changes – Article 21
15. Grievance procedure – Choice of remedy – New, Article 32
16. Waiver – Status of agreement

WAGES FOR 2006 and 2007 – ISSUES 2 & 3

UNION'S POSITION:

The Union's position is for a 5.00% increase in 2006 and 5.00% in 2007. In support of this position the Union made the following contentions:

1. The Union argued that its request for 5% and 5% in 2006 and 2007 increase is justifiable since there is no inability to pay argument raised by the City. The Union pointed to the City's financial status and argued that it has ample tax base to pay the increases sought. In addition, the City has ample unreserved funds to pay the modest increase sought by the Union in this matter.

2. The Union pointed out that the difference between the City's proposal of 2% and 1% in 2006 and a general 3% increase in 2007 and the Union's proposal in real dollars is approximately $57,600.00. The total of the cost to the City overall is slightly less than $92,000.00 over the two years of the contract. The City is well able to afford such a small number in comparison to its overall budget and the financial position the City of Winona enjoys.

3. The Union argued that the City has some 5.5 million dollars in unreserved fund alone and 45 million dollars in investments. In short, the City is financially very healthy and can easily afford to pay the amount the Union is seeking.

4. Moreover, the City would still be in compliance with Pay Equity if the Union's request were granted. By law arbitrators must consider pay equity in rendering wage awards. Here the City will be in compliance even if the Union's proposal were to be awarded and the City could point to nothing that would take it out of compliance under those circumstances.

5. The Union argued that the City's claim that under Pay Equity the officers are "overpaid" is one that has been used to death in these types of cases. The Union pointed to several other arbitral decisions involving these same parties in which the arbitrators essentially dismissed these arguments made by public employers around the state as simply irrelevant. See, *LELS and City of Winona*, BMS 00-PN-1393 (Anderson 2001).

6. The Union also pointed to other internal equity concerns and argued that traditionally, this unit has been granted higher wage increases than the non-union employees and even the other Unionized groups. In fact several arbitrators have noted that over time this unit receives 2.7% higher increases than the general employee groups. As late as 2003 this unit was granted a 4% and a 3.5% increase when the general pattern was 3% for other units. See, *LELS and City of Winona*, BMS 02-PN-1151 (McCoy 2003). Thus, the Union argued most strenuously that the internal pattern of settlements and awards amply supports a larger increase than the remainder of the units within the City.

7. The Union pointed out that in the last round of bargaining, the City granted a 5% increase to other employee groups and a 6% increase to the police units. Here the facts justify a 5.7% increase in each of the contract years; the Union's request of 5% is actually lower than it should be given the historic pattern of interest awards and settlements between these parties.

8. The Union also pointed to external market comparisons as supportive of its position. The Union asserted that the external market cities should be Albert Lea, Austin, Faribault, Mankato, Owatonna, Northfield, Red Wing and Rochester. The Union asserted that despite the size difference, Rochester should be included in the comparison group. Arbitrator Bard used Rochester in his award in 1984 finding that Rochester has been used as a comparison City to Winona in the past and that its presence did not greatly affect the wage comparison outcomes.

9. The Union pointed out that Red Wing, Winona and Rochester are all county seats in their respective counties and that each is part of the Minnesota Economic Development region 10. The Union argued too that each has a technical college and that Rochester and Winona have universities.

10. The Union countered the City's attempt to add Willmar and delete Northfield by arguing that the City did this at the hearing. The Union claimed it has never heard of the proposed addition of Willmar. The Union argued that the City's attempt to add Willmar is motivated not by substantive factors supporting the addition of that City to the comparison group but rather by the fact that it pays its officers significantly less than the comparison cities. This the Union claims is a thinly veiled attempt to add a City without any justification for it. The Union argued that the City's "study" of comparable cities is about as disingenuous as one can get in creating one's own evidence in support of its position.

11. The Union argued that Winona has been and should be compared to the southeastern Minnesota communities to which it has traditionally been compared and any attempt to compare it to a City located in a radically different geographical area must be rejected.

12. The Union argued that when one uses these comparison groups, the proposed increase of 5% is justified. See Union exhibit book, at page 238. There the Union averaged all of the comparable cities it claims should be used and pointed out that the average for top patrol in 2006 is $4,407.21 per month. Given that Winona's average for top patrol in 2005 was $4,176.90, a 5% increase would bring Winona to $4,385.75, which is slightly less than the average for those comparable cities. The Union argues that the 5% and 5% increases are necessary to keep pace with the comparables and to make sure that Winona stays where it has been over time.

13. The Union also points to general cost of living increases as support for its position as well. The cost of living has increased between 3.8% and 4.5% for the first half of 2006. certainly the City's wage proposal will not keep pace with that and it is quite possible that the cost of living will increase even more during the last half of 2006. Given the increases proposed for health insurance, the wage award of 5% is more than justified in order to keep the officers' pay from sliding even further behind the CPI.

14. The essence then of the Union's argument is that the City is financially very healthy and has more than enough money to pay for the Union's proposed increases out of reserves. There is nothing to suggest that the Union's proposal will take the City out of compliance with the LGPEA, Pay Equity. Moreover, other internal equity and the pattern of arbitration awards in this City compel that the award be higher than that granted to other units and the non-Union employees. The Union argued that wage awards have been higher than that over time and should continue. External comparisons, including Red Wing and Rochester, support a wage increase of 5% and 5% in order to keep pace with the relative position of Winona. Finally, the CPI is much higher than the City's proposal and shows that the officers' actual, "real" income would decline considerably if the City's wage increases were awarded.

The Union requests an award of 5% for 2006 and 5% for 2007.

CITY'S POSITION

The City's position was for a 2% increase on 1-01-06 and a 1% increase on 7-1-06 and for a general increase of 3% for 2007. In support of this position the City made the following contentions.

1. The City first argued that the financial position of the City of Winona is not quite as rosy as that urged by the Union. Moreover, the City argued, that the *ability* to pay something does not compel the conclusion that the City *should* pay that.

2. Initially the City notes that the Union's costs are misleading. In order to determine the total impact of a proposed wage increase one must consider more than the simple dollar and cents of the wages themselves. The total cost to the City would be much higher than asserted by the Union when one considers fringe benefits, step increases longevity and other factors. See City Brief at page 8 and 9. The City also pointed out that police expenditures account for 25% of the City's overall general fund expenditures. Such an increase would greatly affect that.

3. Moreover, the ability to pay something is a factor of little relevance. The determination of whether a particular wage increase should be granted is based on other more important factors, such as external and internal factors.

4. The City also asserted that in fact the State Auditor recommends that a 6-month reserve be maintained by cities in order to take account of fluctuation in cash flow and to meet its obligations in that event. Winona in fact is considered to have a low unreserved fund balance, i.e. some 20.2%.

5. Moreover, Winona relies on LGA, Local Government Aid, for 64% of its overall budget. The City is thus exceedingly vulnerable to the all too common whimsical and ill-conceived changes in LGA and is formulated by the legislature and a governor who at times seem more than willing to sacrifice sound accounting principles and the general public good for political expediency. The City simply therefore has no idea what is in store for its budget in the coming few years and the elections this fall may change that scene even more.

6. The City's property tax base is over ¼ exempt, due largely to the presence of a major state university. The City's ability to raise revenue through property taxes is restricted and will likely be restricted into the foreseeable future.

7. The City pointed to a number of other costs and proposed expenditures that limit its ability not only to raise money but also require it to fund many other projects, such as pensions and infrastructure maintenance and reconstruction.

8. The City next pointed to internal considerations in support of its position here. The City pointed to the settlement for 2004 and 2005, the only year in recent memory that these parties have been able to actually settle a contract rather than having to arbitrate it. There the parties agreed that the wage increases should be the same for this unit as those granted to other employee groups. The City argues that the main consideration after all is said and done is to determine what the parties would have agreed upon had they been able to. Here, the best evidence of that is the settlement of the present contract.

9. The City pointed to the table on page 12 of its Presentation Book and pointed out that the 2.5% increase granted to patrol and sergeants listed there for 2005 actually resulted in the same increase as that for other groups.

10. The City argued that the external group for comparison should not include Red Wing or Rochester or Northfield at all but should include Willmar. The City cites a study that it commissioned to establish that Willmar should be included. The claims that the cluster analysis it used to show that Willmar should be included is indisputable statistical analysis.

11. The City thus argues that the external comparables should be Albert Lea, Austin, Faribault, Mankato, Owatonna and Willmar. When one uses the wage figures for those cities, the City argues that the wage proposal by the Union is far out of line.

12. Moreover, presently the City pays it officers slightly above the average when compared to the wages of the other comparable cities. See pages 18-23. For 2005, the average of the 6 cities listed above was $23.83 per hour. Winona paid $24.10, which was above the average and placed it at 2nd among the comparables.

13. For 2006 the City noted that the average among cities that have settled, Northfield has not yet, was $24.54. The City's proposal would keep the officers at or near their traditional position with regard to the other cities, i.e. 2nd and slightly above the average. The Union's proposal would place the officers at $25.31 per hour and make them first by far. This is simply unjustified in the City's eyes. For 2007, while few of the cities are settled yet the Union's wage proposal of an additional 5% would place the officers far above the comparable group.

14. The City countered the Union's argument with regard to CPI and other cost of living factors by noting that these are unreliable measures at best. These factors typically include costs for urban dwellers whereas Winona is a mostly rural community. The City argues that the CPI is not statistically valid in many cases and provides a snapshot at best of the economy. It argues that the City's wage proposals still reflect the economic reality of the Winona region and should be adopted.

15. The City also pointed to Pay Equity considerations and argues that while the Union's proposal would not take it out of compliance with the LGPEA currently, it would result in an even greater overpayment to these officers. The Police Officers are a male dominated class and are currently overpaid using the regression line analysis and the predicted pay analysis. The City argued that granting the Union's proposal for both 2006 and 2007 could well take it out of compliance with LGPEA. Granting the City's proposals would ensure such compliance.

16. Finally, the City pointed out that calls for service have actually decreased over the past year making the Union's proposal even more unjustifiable. These calls have decreased by some 1000 calls from 2004 to 2005 and have dropped by about 15% in 2006.

The City requests an award of 2% effective January 1, 2006 and a 1% increase effective July 1, 2006 and a 3% increase effective January 1, 2007.

DISCUSSION OF WAGE ISSUES

The facts demonstrate a history of labor relations and collective bargaining between these parties that can only be described as difficult at best. The evidence revealed that only once in recent memory have these parties been able to successfully negotiate a resolution of a contract without resort to interest arbitration. A further review of those arbitration decisions revealed that in many instances the same issues keep coming up over and over again – by both sides. The parties claimed that there is a "new day" of bargaining in the City of Winona. One can only hope so and while no arbitrator can order it, it may be advisable to recommend that the parties do what people normally do when there is a new day in real life – wake up to what this is really costing them, not only in economic terms but in terms of public confidence in the institutions of government and the sanctity of the collective bargaining process. Negotiating a collective bargaining agreement to conclusion is hard work and is best done by professionals who understand the reality of bargaining and the needs of their own clients or members but also of the needs of the other side. It requires that people leave emotional diatribes to the side and get down to the business of resolving issues rather than creating them. It is against this unfortunate backdrop, one created by both parties, that this matter must proceed.

Turning to the question of the appropriate wage award several factors must be weighed and decided. A review of internal; and external comparisons, ability to pay and a consideration of other economic factors.

Ability to pay. The Union argued that the City has ample funds to pay for the increases it proposes. The Union pointed to the unreserved fund balance, the City's tax base and the investments and argued that there is more than ample money to pay the increase it seeks. In fact the Union argues, there is only approximately $57,600.00 difference between the cost of the City's proposal and its own.

The City argued that these figures are misleading and that the actual cost is much higher when all of the factors are taken into account. Moreover, the City of Winona relies very heavily on LGA, which is subject to the whims of the legislature and a governor whose position on taxation has been Draconian at best. In short, it is impossible to say with any certainty what the financial future holds for the City.

The evidence showed that the City certainly does have the ability to pay even the Union's proposed increases. That however is not the sole determinative factor. Whether the employer can pay it is frankly not as important as whether there are other factors in the case to support the argument that it should pay it. Here simply saying that the employer has the money is not enough. Moreover, it is not enough to say that the actual dollar cost is small. Thus, while the ability to pay may be a very relevant factor in a case where the employer shows it truly cannot pay a certain wage proposal or where the other factors support the wage increase, this factor is not considered highly relevant here.

Cost of living factors. Much the same can be said for reliance on the CPI. This is again a minor factor in this matter. The parties differed greatly on the statistical analysis and the validity of certain CPI numbers. The Union argued that the City's wage proposal will not keep pace with inflation overall. Indeed, one prior arbitrator found this to be a very significant factor. See *LELS and City of Winona*, BMS 00-PN-1393 (Anderson 2001) at page 21. There the arbitrator awarded 3.8% and 3.4% wage increases based in some part on inflation figures. It is significant to note though that the main rationale for granting these increases was based on external market comparisons as well as internal wage comparisons.

CPI figures can be a useful tool in justifying an award to be sure. Here though the more important factors are the internal pattern of settlements and awards and the external market considerations. As will be discussed more below, the CPI seems to be in line with the appropriate wage increases granted herein, those wage increases on these facts were influenced far more by other factors than the CPI itself.

Internal wage patterns/LGPEA. Arbitrators are required to take LGPEA into account when determining appropriate wage awards. That was done here. The evidence showed that the City is currently in compliance with LGPEA. The evidence further showed that neither the Union's nor the City's wage proposals would bring the City out of such compliance. How that would affect wages beyond 2007 or how such wages might affect LGPEA compliance in later years is not before me nor can any determinations be made with regard to that.

Moreover, the City's argument that the officers are "overpaid" using the predicted pay analysis was not persuasive. The analysis of Arbitrator Anderson in the decision from 2001 is instructive. There he noted

> Finally, I am not real concerned that the police officers are overpaid using DOER's pay equity analysis. If DOER established wages. There would be no need to subject wages to the collective bargaining process Arbitrator Bard and Olsen both recognized this principle in recent decisions. This is something neither the State nor the Act requires. Finally, many jobs within the Employer have greater predicted pay differences than the police officer classification using the DOER analysis model. Slip op, *LELS and City of Winona*, BMS 00-PN 1393 (Anderson) at page 18-19.

See also, *LELS and City of Winona*, BMS 92-PN-891 (Bard 1992), where the arbitrator held that:

> In my opinion, the neat and clean uniform system of a pure "pay for points" world in which all employee groups are compared internally and compensated on job value alone is not what the legislature intended and can never completely come to pass in a world in which both collective bargaining and interest arbitrations still exist. No arbitrator can fulfill his statutory mandated job if he cedes his judgment in these matters to some computerized model or mechanical whereby regression lines make the determination automatic. *Id,* slip op. at page 11.

These pronouncements have particular cogency here. Thus the arguments that the officers are somehow "overpaid" when compared to the DOER regression and some predicted pay analysis are not persuasive. The question is whether they are appropriately paid when compared to the other internal groups and the external groups in the market.

The evidence showed that for the most part, these parties have relied on interest arbitration to determine their contracts. The Union argued that the arbitrator should thus determine the wage award, and indeed the entire contract, based on what the parties would have settled for following a strike. The law of course does not grant the right to strike to essential employees but the Union argued that the power structure in labor relations is based in the use of the Union's ultimate weapon – the strike, to force the employer to agree to certain terms. The Union argued that the true intent of the legislature was to allow interest arbitration to be a substitute for the strike and not negotiations.

This line of reasoning does not square with the holdings of most interest arbitrators who have tackled this thorny questions. Neither does it truly clarify the difference between what the parties would have been able to determine for themselves after a strike or simply following negotiations where the prospect of a strike loomed out there somewhere. The reality is that essentially employees do not have that right and it is hard enough to determine what the parties might have negotiated for themselves if they had been able to settle the contract, especially here. It is thus virtually impossible to determine what parties would have settled for after a strike. The best analysis proceeds from a review of the internal pattern of settlements and a comparison of the external market to determine this issue.

Here, the evidence did show that indeed, the internal pattern of settlements for the most part has indeed been to grant a somewhat higher wage to the essential units than to the non-essential and non-union employees. This is a significant factor here. Only the 2004-05 contract was settled by negotiation. These parties have resorted to arbitration over most of the past several decades. Under these unique facts, it is frankly more likely that these parties have not been able to negotiate a contract and the real question then is what has the pattern of awards been. As arbitrator McCoy noted in his case with these parties: As stated at the outset, the parties' reliance on interest arbitrations as the normal method of resolving difficult negotiations requires a great deal more emphasis to be placed on the pattern of awards rather than speculating on what the parties might have done had they successfully concluded negotiations. Those patterns indicate that the wage increases for police officers and sergeants have kept ahead of those non-police related bargaining units." *LELS and City of Winona*, BMS 02-PN-1151 (McCoy 2003) slip op at page 10.

Thus, while the determination is not what the parties would have negotiated following a strike, neither is it what the City urges. The City asks the arbitrator to simply follow the internal pattern of settlements with the other non-essential and non-union groups. The City argued that this is the best measure of what the parties would have negotiated.

The simple fact is that with one exception, these parties have virtually never been able to negotiate anything for themselves. This the statement by Arbitrator McCoy is particularly germane – it is the pattern of awards over time that is the most persuasive factor here. Moreover, even the one settlement, for the 2004-05 contract, shows that the police officers and sergeants received a slightly higher wage rate than did other groups. The City argued that this really meant that they received the same thing but there was little evidence offered as to why that was. Thus the more important factor here was that finding by other arbitrators that the essential units have indeed been awarded a higher wage than have other groups.

One factor that arbitrators use is the notion of internal patterns and the need to make them consistent where possible and appropriate in order to maintain harmonious labor relations. If for example, the internal patterns shows a consistent settlement for a certain wage increase, that is a very compelling fact to be considered. Granting a wage increase higher than that to one unit must be based on strong evidence to justify that especially where other essential units have agreed to a wage increase.

No such facts appear here. In fact, the record shows that the other essential units have not yet settled for 2006 or 2007. Given that, the City's argument is not persuasive that the award should simply reflect what the non-essential and non-union groups received.

The Union argued that there has been a pattern of awards of 2.7% more for the essential units than other groups. See, *LELS and City of Winona*, BMS #00-PN-1393 (Anderson 2001) slip op at pages 16-17. See also *LELS and City of Winona*, BMS # 02-PN-1151 (McCoy 2003) slip op at page 10. (Citing Arbitrator Jensen in *LELS and City of Winona*, BMS 01-PN-1179 (Jensen 2001) that case was not included in the materials provide by the parties however.)

On balance there is merit to the Union's argument that the internal pattern of awards shows that the increases have indeed been higher for the police units than those granted to or negotiated by the other units. How much that ought to be must await further analysis and a review of the external factors and comparables as well but the evidence as a whole shows clearly that this relationship has a unique history which overrides the argument that the internal pattern of settlements must be what the City says it is. Thus the simple fact that the other groups have all received the same 2% plus 1% in 2006 and a 3% increase in 2007 is not compelling here given these facts.

External factors – Determination of comparable cities: As noted above, this case proceeds on a multi-level analysis. The determination of the appropriate wage increase here requires a combination of several factors. The facts noted above show clearly that there is no true internal pattern of settlement since these parties rarely settle their contracts and the award support the conclusion that the increases are more than the other employee groups. Here too there are several significant factors on the external market that weigh heavily on the decision as to the appropriate wage increase award.

The first question was which cities should be used as comparable cities. The Union argued that Albert Lea, Austin, Faribault, Mankato, Owatonna, Northfield, Red Wing and Rochester should be used as comparables. The City agreed that Albert Lea, Austin, Faribault, Mankato, Owatonna should be used but argued that Red Wing and Rochester should not be used. In addition, the City argued that Willmar should be included on the list.

The basis for the Union's argument that Red Wing and Rochester should be included is that they are geographically close and that Red Wing is on the river as is Winona. Rochester has a major university as does Winona and that even though it is much larger; the housing costs are very similar.

The City opposed this and argued that Rochester should not be on the list given its far larger population and very different demographic given the health care community there. Red Wing, it argues is far more like Elk River and should be compared to cities that are far closer to the Twin Cities.

The City also argues that Willmar should be included in place of Northfield and cites a study it apparently commissioned to support this very conclusion. Turning to the "Cluster Analysis" used by the City to support its position that Willmar should be used as a comparable, it should first be noted that when statistics are concerned there is simply no such beast as "indisputable evidence." All too often statistics are made to fit motivation. Here that was amply clear. Moreover, the analysis provided by the City was unpersuasive and appears to have been commissioned for the express purpose of providing the very sort of self-serving evidence the City wanted in order to support its position here. There was little in terms of the evidence used to make the determinations found in this analysis and no explanation either by way of expert testimony or even lay testimony as to how these conclusions were made, how valid the statistical analysis was or whether the conclusions were in fact made prior to the analysis. Simply stated, it was not persuasive.

Willmar is geographically quite far away from Winona and the other cities in the southeastern Minnesota Region. It is a very different community and is found not to be an appropriate comparable in this matter.

Moreover, the City provided no compelling reason to exclude Northfield. While it is certainly closer to the Twin Cities than is Winona it was included in the past round of bargaining and the City agreed that it should be included in the 2003 arbitration. There was no persuasive evidence shown to compel a change in that.

Having said that it is also clear that Red Wing and Rochester should similarly be excluded in contravention to the Union's argument. Rochester is much larger in population and has not been used as a comparable for more than 2 decades. Arbitrator Wallin excluded Red Wing due to its hydroelectric plant and lack of use of LGA. These factors alone are very compelling. In addition, other arbitrators have also faced the argument that Rochester should be excluded and have rejected that argument.

Perhaps the most compelling piece of evidence here is that for whatever reason, these parties were actually able to agree that Albert Lea, Austin, Faribault, Mankato, Owatonna and Northfield should be comparables in the last arbitration. Some arbitrators did include Red Wing and Rochester in the 1980's and early 1990's but these have not been included for some time. It should be noted that the analysis of Arbitrator Wallin in the 1997 arbitration is persuasive. He also noted that several other arbitrators have excluded Rochester given its size, larger economy and tax base and the fact that it receives no LGA. Red Wing is frankly a closer call and as things change there may in the future be compelling reason to include it but for now the evidence shows that it should be excluded from consideration as a comparable City for the reasons set forth in Arbitrator Wallin's decision involving these parties. Finally it was of some interest that the City used Northfield as a comparison City for purposes of arguing that the health insurance premiums should be awarded per the City's position. Northfield is thus quite clearly considered by these parties to be in the comparison group.

Accordingly, the comparable cities for purposes of comparing wages and other factors in this matter are Albert Lea, Austin, Faribault, Mankato, Owatonna and Northfield.

External factors relating to the wage award. The evidence must be gleaned from both parties' information in order to determine how to best award a wage. The Employer provided only information from the cities it regarded as appropriate. Likewise the Union did the same. Accordingly, the two lists were melded together in order to arrive at cogent information about what the comparable figures are to the extent possible, given that most cities have not yet settled for 2007.

In 2006 the evidence showed that the top patrol pay for the comparable cities was as follows:

	2005 top patrol	2006 top patrol	2007 top patrol (where settled)
Albert Lea	4,125.33	4,208.53	N/S
Austin	4,099.33	4,265.73	N/S
Faribault	4,203.33	4,329.86	N/S
Mankato	4,174.75	4,300.00	4,429.00
Owatonna	4,175.60 (24.09 X 2080)	4,290.00 (24.75 X 2080)	4,416.53 (25.48 X 2080)
Northfield	4,291.73	N/S (4,484.13 proposed)	N/S
AVERAGE:	4,178.35	4,278.82 (w/o N'Field)	4,422.77 (w/o N'Field)
Winona	4,176.90	N/S	N/S

In 2004 Winona was slightly above the average while in 2005 it was just slightly below it. See Union Exhibit Book at Page 235-238 and City Book at pages 18-23. Winona was 3rd out of the 6 comparable cities in terms of monthly salary rates for top patrol in 2004 and 2005.

Northfield is not yet settled for 2006 or 2007. However there was evidence to suggest that the wage proposal for 2006 was an increase of 4.5%, or a monthly top patrol wage of $4,484.13. The Union argued that in effect there would be a 16.5% increase from 2005 to 2007. This appears to include step increases however and there was little if any evidence as to what Northfield's 2007 wage proposal really was. The Union's figures do not on this record reflect the general increase but rather appears to include step increases as well. It also appears that the parties in Northfield maybe changing the step increases as well; this too will alter the figures somewhat making it difficult if not impossible to determine a general wage increase for 2007. On this record it simply cannot be determined exactly what the 2007 wage increase is for Northfield.

The City introduced no evidence at all with regard to Northfield other than to simply argue that it should not be included even though it too is a college town in southeastern Minnesota. No contravening evidence was offered to rebut the Union's claim that there was a general wage increase of 4.5% in Northfield. If the Northfield figure is placed on the matrix above the average changes to $4,313.04.

As noted herein, the internal pattern of settlements, if it can be called that, supports the Union's claim that one need not be inexorably tied to the settlements and grants given other employee groups in this City on these facts. The external market is also to be considered here as well. The question thus is by how much should the wages be increased to take account of the external market cities in order to keep pace with the wages of those other cities and to retain Winona's relative position with regard to them.

Several options were considered. If the Union's wage proposed 5% increase were to be granted it would raise the top patrol pay from the 2005 rate of $4,176.90 to $4,385.75 for 2006. This would place Winona 2nd from the top, if the Northfield figure is used, and at the very top if it is not, of the comparable cities. If that pattern was to continue and the 5% granted in 2007, the 2007 rate would be $4,605.32. This too would appear to place Winona at the top of those comparables, insofar as that can be determined given the paucity of information about 2007 at this juncture. Thus, the external factors here do not support a 5% increase. Such an increase would place Winona well ahead of average of the comparable cities and well ahead of its relative position within that group.

If on the other hand the City's proposal were to be ordered, the wages for 2006 would be $4,260.44 for the first 6 months of 2006 and $4,303.04 for the remaining 6 months. The total compensation for the officers for the year would thus be $51,380.89, or a blended monthly rate of $4,281.74. This would place Winona behind Faribault, where it appears to have been historically, and slightly behind Mankato, where it has *not* historically been. Winona appears to have been just slightly ahead of Mankato over time if only by a few dollars per month.

If a straight 3% were to be granted this would place the top patrol rate at $4,302.21, just slightly ahead of Mankato. On this record however, it appears that Northfield officers will receive at least a 4.5% increase in 2006, which changes the average somewhat. Winona has been very near the average of the comparable cities and it is appropriate on these facts to render an award that maintains that relative position. Here an increase of 3.25% would result in a top patrol rate of $4,312.65. This maintains Winona slightly above Mankato and slightly below the average of the comparable cities if the Northfield figures are used, and it appears appropriate to do so on this record. This a general increase of 3.25% for 2006 furthers the internal pattern of larger increases than the other groups have received and maintains Winona at or near its relative position within the comparable group. Accordingly, the wage award for 2006 shall be a 3.25% increase effective January 1, 2006.

Turning now to the 2007 wages, it is somewhat more difficult to ascertain the appropriate wage adjustment since so few of the comparables have settled for 2007. It appears that Mankato and Owatonna have settled for 2007 and that each received a 3.0% increase in wages over their respective 2006 wages. If the Union's proposal of 5% were to be implemented on the 2006 wage awarded above of $4,302.21 the top patrol wage rate would be $4,517.32. That would place Winona $88.00 per month above Mankato, which is considerably higher than the difference over time as compared to that City. Faribault has had the highest wages over the past several years and pays in 2006 a top patrol rate of $4,329.86. In 2005 Faribault, the City with the highest recent pay scale in the comparable group, was some $26.00 per month higher than Winona. For these relative positions to be maintained, while this is somewhat speculative, Faribault would have to pay in 2007 an additional approximately 4.3% over its 2006 wages. As noted above, there is some evidence that Northfield will receive a 4.5% increase in 2006 but it was not possible to accurately determine for 2007 what the increase will be and it is not appropriate to speculate on what that might be given the facts here. Suffice it so however that the evidence on this record supports the Unions; claim that Northfield will pay considerably more for its officers in 2007 over what it was paying them in 2005.

If the City's position of 3% increases in 2007 is awarded on the 2006 wage rate awarded herein, the 2007 top patrol wage rate would be $4,431.28. In 2004 the average top patrol rate for Albert Lea, Austin, Faribault, Mankato, and Northfield was $4,037.25. (Note that no information regarding Owatonna was available on this record for 2004). Winona was at $4,075.02, some $38.00 dollars higher than the average. Winona was also $23.00/month higher than Mankato at that point.

In 2005 the average top patrol rate for those cities was $4,178.89 whereas Winona was $4,176.90. For 2006 the top patrol average for these cities, excluding Northfield, was $4,278.82. If one includes Northfield the average appears to be $4,313.04. Winona's wage rate awarded above for top patrol is $4,312.65. This places Winona approximately where it was in 2005, i.e. slightly below the average but leaves it where it is with respect to its relative position vis-à-vis the other cities in the comparable group.

It is always difficult to determine wages in a scenario such as this due to the lack of hard information about what the comparable cities have done. Two of the cities in the comparable group settled for a 3% increase for 2007. Northfield may or may not be more than that. Moreover, if a 3% increase is awarded for 2007 that should keep pace with the increases in the comparable group.

The question is then whether there is something internally that would dictate a larger increase than that given the history between these parties, which has been discussed in all too much detail already. Over time, the police units have indeed been awarded greater wage increases than the other groups, as noted above. Here both internal and external market considerations must be taken into account. It is not sufficient to simply apply an external market consideration and award that "pattern" of external settlements without also looking internally at what has happened with these over time.

In 2001, the police unit received a 3.4% increase and the sergeants received a 4.25% increase while the other groups all received 3%. In 2002 the police received 4% and the sergeants got 3.5% when the other groups all received 3%. In 2003 the police and sergeants got 3.5% when the other groups all got 3%. In 2004 the police got 2% while the sergeants got 2.5% plus an additional 1.5% when the other groups got 2%. In 2005 police and sergeants got 2.5% whereas the other groups got 2% and 1%. 2004 and 2005 was the contract that was settled without resort to interest arbitration and even then there was evidence to suggest that the police group received something different from the rest of the employee groups.

There is some merit to the Union's argument that there has been a larger increase given to the police employees. The thorny question is whether, based on the internal and external evidence in this matter, it is appropriate to award something more than 3% for 2007. As noted above both internal and external considerations played heavily in this matter.

Again, several options were considered. A wage increase of 3%, as the City has proposed, may or may not keep these officers where they are relative to the external market. On balance it appears that it may not given the Northfield figures.

A 5% increase over the 2006 award would result in a 2007 top patrol rate of $4,528.28. There is little evidence to support such an increase. That would place Winona far ahead of the external market and well ahead of the internal groups. Such an increase is not justifiable on these facts.

A 3% increase would result in a top patrol wage for 2007 of $4,442.03. A 3.25% increase again for 2007 results in a top patrol wage of $4,452.81. At this point it is not possible to determine what the true average of the comparable cities is since only 2 have thus far settled. Northfield's figures appear to be poised to increase that but it is not possible to determine by how much. Accordingly, on these facts it is more appropriate to look internally than externally. There is considerable merit to the Union's claim that over time this unit has virtually always received a somewhat larger wage increase than other units or employee groups within the City. While the evidence does not support an increase as high as the Union claims it is appropriate to award an increase of 3.25% for 2007 as well. This is based on the internal considerations as noted above, the fact that externally, this award appears likely to maintain Winona at or near its historic levels relative to the comparables, the fact that the City can afford this increase and the fact that such increases, both for 2006 and 2007, will not result in any adverse consequences relative to the LGPEA.

Accordingly, on these facts it is determined that a general wage increase of 3.25% for 2007 is appropriate as well.

AWARD ON WAGES FOR 2006 AND 2007

Accordingly, the award is for an increase in wage rates of 3.25% in 2006 and a 3.25% increase for 2007.

HEALTH INSURANCE FOR 2006 AND 2007 – ISSUES 8 & 9

UNION'S POSITION

The Union proposed the following language for 2006:

> The employer shall contribute $500.00 per month for employees selecting single coverage and $1200.00 per month for employees electing dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage or, an amount equal to that established for the other City of Winona employees which ever is greater.

For 2007 the Union proposes the following:

> The employer shall contribute 100% of the premium cost of the Union-designated insurance plan for employees selecting single coverage and 90% of the premium cost of the Union-designated insurance plan for employees electing dependent coverage.

In support of these positions the Union made the following contentions:

1. The Union pointed out that the police officers opted to go to their own plan in 2003 when they joined PEIP. This, the Union argued was motivated by the manipulation of the insurance programs by the City in order to lower its cost of insurance. This the City did by putting more of the burden on the employees' shoulders thus reducing the real value of any wage increases over time.

2. The Union pointed to the 1998 arbitration here where the arbitrator again noted what the Union terms the appalling insurance situation, indeed the appalling nature of labor relations in general between these parties. There the arbitrator noted that the increased cost of insurance eroded the wage settlements. Arbitrator Towley-Olsen also disagreed with the City's argument that insurance should be driven by the "pattern" of settlement with the non-union employees. She noted that the effect of the "me too" language proposed by the City then, and now, is to remove the area of insurance from collective bargaining. For essential employees, this means a resort to arbitration.

3. The Union pointed to that arbitration as precedent for changing the language from the "me too" provision proposed by the City which obviates the need for bargaining and [places all power to set the insurance plan with the City. The Union argued most strenuously that since the police officers went to the PEIP the standard arbitral precedent of simply awarding what the other employee groups get insofar as insurance is concerned does not apply here. They have a different plan and should not be simply lumped in with the rest of the employee groups.

4. The Union's main concern was over the Health Reimbursement Accounts, HRA, the other employee groups receive. The Union argued that this amounts to an additional benefit to those employees above and beyond the amount the City contributes to the cost of employee health coverage. Here the City pays $331.00 per month for single and $929.00 for family coverage. The other groups get an HRA account to cover the cost of their deductibles. This, the Union asserts is an additional benefit above and beyond the premium payment by the City. The Union argued that the police officers should; get that benefit as well in order to be considered equal to the other employees.

5. The other main argument made by the Union is that internal consistency is not as important a factor here since these employees have a separate plan. The Union argued that the most appropriate comparison should be the external market, i.e. the external market comparison cities.

6. The Union pointed to those cities and argued that the average employer-paid insurance contribution for the comparison group is 80%. In 2003 Winona paid 90% of the cost of employee health coverage whereas now it pays 73%. The Union asserts that this disparity must be remedied.

7. The essence of the Union's argument is that a set dollar amount must be instituted to make sure the City does not resort to its old habit, rejected in 1998 by the arbitrator, of simply passing on the increased insurance cost to the employees. Here while the Union claims that the award should be to make the insurance plan consistent with other City group, that means on these facts an increase to cover the HRA that other employee's get and these employees do not.

The Union seeks an award of the language set forth above.

CITY'S POSITION

The City proposes the following language for 2006 and 2007:

> For 2006, the employer will contribute to each employee participating in the Union-designated insurance plan an amount equal to the cost of the lowest plan option of the City designated insurance plan(s) for single or dependent coverage, or an amount equal to that established for the City of Winona Employees, whichever is greater. For 2007, the Employer will contribute to each employee participating in the Union designated insurance plan an amount equal to that established by the Employer for non-union City of Winona employees. Notwithstanding the foregoing, in no event shall the City's contribution to the Union designated insurance plan exceed the total monthly premium payment for an employee participating in the Union designated insurance plan.

In support of this position the City made the following contentions:

1. The City argued that the police officers chose there own plan with its own set of benefits and its own pricing as far as the premiums paid. The officers cannot therefore claim entitlement to whatever benefits that plan, the PEIP plan, establishes plus whatever other benefits the City designated plan has. Yet, the City argued, that is precisely what the Union is claiming here.

2. Currently the City contributes $331.00 for single coverage and $929.00 for family coverage. This is paid to every City employee whether they are in the PEIP plan or the City designated plan.

3. The City argued that since 1991 all of the arbitrators except Arbitrator Towley Olsen have held that the City's contribution for health insurance should be the same for the police officers as for every other City employee. Even in the 1998 arbitration despite the rhetoric from the arbitrator about how increases in health insurance have eroded real wage gains, the arbitrator awarded a contribution that was the same across the board for all City employees. In fact, the award for the police officers was the same as that granted to other City employee groups. In the second year of the contract the arbitrator also essentially awarded the City's position by awarding the specific amounts paid by the City for the low cost option in 1998.

4. Since that time, the practice has been for the City to contribute the same amounts towards every employee's health insurance plan, whether the employee is in PEIP or not.

5. The City argued that the Union provided no justification for any increase and cited longstanding arbitral precedent for the proposition that the most significant factor in determining fringe benefits such as health insurance is internal consistency. Here, the City argued, internal consistency requires that the police unit here receive the same monthly contribution as that paid to other City employee groups. The City noted that the Unions proposal to increase the dollar amount for 2006 is not only contrary to the way in which these contributions have been done in the past but also increases the cost significantly without any economic justification whatsoever.

6. The City noted that the Union's proposal would in fact simply increase the cost to the City by $2,028.00 for single coverage and by $ 3,252 per year per employee. The City notes that the officers elected to go to the higher cost PEIP plan and now cannot complain that this is too high. It was their choice to leave the City's plan.

7. With regard to the HRA issue, the City remains adamant that the HRA accounts are simply a benefit that the City designated plan includes. It does not involve any additional contribution by the City. The City pays what it pays, i.e. $331.00 per month for single coverage and $929.00 per month for family coverage. There is no additional money from the City. The HRA accounts are simply a benefit that the City plan includes; just as there are other benefits the PEIP plan includes that are not included in the City plan. When the officers elected to go to the PEIP insurance program, they in essence voluntarily opted not to elect to have HRA reimbursement accounts. Thus, the City argues, the "cost" of the HRA is subsumed in the premium paid for insurance in general by the City; it is not separate.

8. Externally, the City first argued that there is little justification to look outside the City since for the most part, a benefit issue like this is determined by internal measures. Even if one does look to the external group, the City's proposal maintains where the City of Winona is relative to the other cities in the comparison group. See City Book at page 54. This information showed that Winona is above the average of the comparison cities and that the Unions proposal would place Winona well above that average without any justification for doing so.

9. The essence of the City's argument is thus that the main basis for the Union's argument, i.e. that the HRA accounts are really a benefit paid above and beyond the monthly premium contributions is simply incorrect. The City puts nothing additional into the health insurance. The HRA accounts are simply a part of the package of benefits available to the employees in the City designated plan; nothing more nothing less. Moreover, the Union's claim to increase the premiums to $500.00 and $1,200.00 is utterly without justification and should not be awarded. Finally, the City has maintained consistently over several contract terms the same contribution across the board for all its employees. That precedent should be maintained here as well.

The City seeks an award for the language set forth above and in its final positions to BMS

MEMORANDUM AND DISCUSSION OF HEALTH INSURANCE

Once again the history of bargaining between these parties on this issue demonstrates not only difficulty agreeing but also an unwillingness or inability to agree on this issue even after they agreed on this issue. The divergence of the parties' relative positions in this matter more than amply illustrates this point. The Union claimed that it needed to leave the City designated insurance program in order to avoid the cycle of having the City simply pass onto the employees the increased costs of health insurance by relying on the "me too" clauses in the labor agreements. Since these were tied to the premium payments made to the non-union employees the Union argued that the City retained almost plenary control of this. The Union pointed to the statements made by Arbitrator Towley Olsen in her award in the 1998-99 contract on this point. There she noted that the premiums increased while the payment by the City did not, thereby eroding any gains made by employees in wages. She also noted that the "me too" clauses have the very real effect of obviating the need for collective bargaining on this vital issue by simply tying the Unionized employee benefits to those established "by Employer fiat" for the non-unionized employees.

The Employer on the other hand argued that the practice of paying a set amount for all employees is longstanding in the City and that the real motivation here is the cost of the plan selected voluntarily by the employees in this unit. The City's argument boils down to the age-old admonition that "you pays your money and you takes your choice."

Determining this issue was no less difficult than determining the wages. The current contract provides that "For 2004 and 2005, the EMPLOYER will contribute to each employee participating in the Union-designated plan an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage, or an amount equal to that established for the other City of Winona employees, which ever is greater." See, article 23 of 2004-05 contract.

This clause was apparently part of the voluntarily negotiated contract between these parties. Significantly, it does not contain a set dollar figure even though the evidence showed and indeed the parties agreed, that the current contribution amounts for single coverage is $331.00 per month and $929.00 per month for family coverage. The evidence showed that these contribution amounts are paid to all City employees irrespective of which plan they are in.

The evidence further showed that the police officers left the City designated plan in 2002 apparently frustrated with the cost of the City designated plan. The Union made much of this and why they left but the simple fact remains that at this point it matters little why they left. They did and are now part of the PEIP program. The question is what is the appropriate contribution rate to be awarded here.

With few exceptions, health insurance premiums tend to be a benefit examined based on internal considerations. An external comparison, while certainly possible under appropriate circumstances, may be skewed by historical and economic considerations that can greatly affect what one political subdivision pays as compared to another. Here it is appropriate to start with those internal considerations.

The evidence showed that for 2006 the current City contributions for single and family coverage are $331.00 and $929.00 respectively. The Union acknowledges that but asserted that in fact there is an additional benefit being paid to the other employee groups above and beyond that in the form of the HRA accounts. The Union argued that employees are allowed to establish an HRA account to cover the cost of their deductible thus reducing their overall cost of health insurance. This is not a benefit available under the PEIP; ergo, the benefits are not the same. The Union seeks an award that essentially gives the police the HRA or its equivalent in order to maintain parity with the other employee groups.

The evidence on this supported the City's view however and showed that the HRA accounts are not in fact paid with additional City funds but are rather a benefit that is a part of the benefits available under that plan. Thus, while the HRA is available to the City employees they are not receiving additional coverage only different coverage. The City's points on this were well taken and showed that when the City pays its contribution toward health coverage the employees are therefore getting that amount of coverage and no more. Similarly, the PEIP plan has different benefits as well, some of which are apparently better than those available to other City employees. There is thus merit in the City's argument that no additional money is put into the plan and that to do so would in fact be to compensate these employees better than the other groups.

The next task is to determine the appropriate level of benefits. The Union seeks a set dollar amount for 2006 as set forth above. There is again considerable merit to the City's claim that there was no justification for this. The Union provided no basis for the position that the City should pay $500.00 and $1,200.00 respectively other than it would be more money for the employees in this group. The evidence showed conclusively that the City is paying $331.00 and $929.00 per month for coverage.

The Union argued that an internal pattern of consistency is not necessary or mandated here due to the difference in the plans. That however is not the question. The question is what is the appropriate City contribution to the employee's health insurance plan. This would be different than if there were several different plans from which the employee could chose and the City simply contributed a certain dollar figure and allowed the employee to select whichever plan suited their individual or family needs best. Here the evidence compels the conclusion that the City contribution should be the same across employee groups.

A review of the external market is not strictly necessary on these facts but was done anyway. The evidence again shows that Winona's contributions are in line with that paid by other cities; at least to the extent that could be determined on the limited record presented here. It was not for example shown why certain cities had certain levels or whether these levels were the result of bargaining or historical agreements made that established them. Therein lies the difficultly in using this measure. Suffice to say that there was no compelling evidence to suggest that Winona's health insurance contribution were so out of line with the external comparables as to warrant the major change suggested by the Union.

The City desires very general language as set forth above. On these facts given the history of these parties and their track record of misunderstandings based on language like that the 2006 language should include the actual dollar figures used rather than a more general "me too" type language.

The language of Article 23 for 2006 will read as follows: "For 2006, the employer shall contribute to each employee participating in the Union-designated plan $331.00 per month for employees selecting single coverage and $929.00 per month for employees selecting dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage or, an amount equal to that established for the other City of Winona employees whichever is greater."

For 2007 the City desires language that requires it to contribute an amount equal to that established by the City for the non-union employees. This would of course grant it the right to alter without further negotiations the contribution based on the rate paid on behalf of the non-union employees. This is precisely what Arbitrator Olsen appeared to have been talking about in her decision and what the Union's greatest fear is. It would thus be inappropriate on these facts to grant the City's language. Doing so would radically alter the existing state of this benefit.

There has been over time an internal consistency between the Union and non-union groups that could well be adversely affected if the City chose to change the non-union groups' rates, thereby taking this group with them. That could then lead to an internal inconsistency vis-à-vis the other employee groups who may or may not have corresponding language in their agreements. (It was not shown on this record what exact language those other groups have or how such a change in the non-union groups would impact those health insurance contribution rates.) Accordingly, the City's proposal to allow a change in this units' rate tied to a change in the non-union's rates cannot be granted.

On the other hand it would also be inappropriate to award the Union's proposal for 2007. The Union is seeking 100% of the single coverage and 90% of family coverage paid by the City. The evidence showed that this is very likely far higher than the $331.00 and $929.00 currently being paid and could well increase even more. Further, without knowing what that even is, it would be pure speculation to award such a percentage since to do so might well place an undue burden on the City.

The Union's concern about the costs of insurance being simply passed on to the affected employees is understandable. This is a concern raised in virtually every jurisdiction, and in many private sector employers throughout the state and perhaps even the country. As insurance costs increase somebody has to pay them. The Union's proposal would require the City to bear the total cost of insurance and there is simply no justifiable basis to do that on these facts. While understandable, it would also not be appropriate to award a percentage of the increase to be borne by each party when insurance premiums rise. Fixing those percentages would be a guess at best. Interest awards must have some justifiable and explainable basis and arbitrarily setting a percentage would fall short of that goal. Likewise, there appears to be no other City employee group for which a percentage is paid, as opposed to a set dollar figure.

The current labor agreement provides that "For 2004 and 2005, the EMPLOYER will contribute to each employee participating in the Union-designated plan an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single coverage, or an amount equal to that established for the other City of Winona employees, whichever is greater." There is no justification for the insertion of the percentages proposed by the Union. This would radically alter the existing practice and could upset any internal consistency across employee groups insofar as the contribution rates are concerned.

Here, as in 1999, the rates have not been set for the second year of the contract. This was the same dilemma facing Arbitrator Olsen, see slip op at page 8, of the 1998 Award herein. Both parties raised valid points with respect to this issue. The City wants to maintain consistency while the Union wants to be protected from what it sees as the potential arbitrary action to cut what is reimbursed to the non-union employees and have their rates drop as well. Rather than awarding 100% of the lowest cost option as Arbitrator Olsen did in 1998, the appropriate course of action is to take account of both concerns by crafting language that establishes a floor based on the 2006 rates yet maintaining some consistency in the event the rates increase for any other employee group.

The appropriate language should be to continue the contribution rates from 2006 unless that increases based on what the other employee groups receive, which ever is greater. Thus, this is not based solely on the non-union groups but the greater of the 2006 contributions and any other employee group in the City.

The 2007 language is awarded as follows: "For 2007, the Employer will contribute to each employee participating in the Union-designated plan $331.00 per month for employees selecting single coverage and $929.00 per month for employees selecting dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage, or an amount equal to that established for any other City of Winona employees, whichever is greater."

Notwithstanding the foregoing, in no event shall the City's contribution to the Union designated insurance plan exceed the total monthly premium payment for an employee participating in the Union designated insurance plan." The last sentence was not disputed and is appropriate to prevent the payment of health reimbursement that is higher than the actual cost of the monthly premium.

AWARD ON HEALTH INSURANCE

"For 2006, the employer will contribute to each employee covered by this Agreement $331.00 per month for employees selecting single coverage and $929.00 per month for employees selecting dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage or, an amount equal to that established for the other City of Winona employees whichever is greater."

"For 2007, the Employer will contribute to each employee participating in the Union-designated plan $331.00 per month for employees selecting single coverage and $929.00 per month for employees selecting dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage, or an amount equal to that established for any other City of Winona employees, whichever is greater."

Notwithstanding the foregoing, in no event shall the City's contribution to the Union designated insurance plan exceed the total monthly premium payment for an employee participating in the Union designated insurance plan."

SHIFT DIFFERENTIAL – ISSUE #4

UNION'S POSITION

The Union seeks a clause as follows: "Employees scheduled to work the majority of their shift between the hours of 6:00 PM and 6:00 AM shall receive one dollar per hour in addition to their regular wage for their entire shift." In support of this the Union made the following contentions:

1. The Union cited an article from the American College of Emergency Physicians regarding the circadian rhythms of human sleep patterns. The Union argued that human sleep patterns are genetically and biologically tied to daylight. When that is disturbed or when humans are required to work during a time when they are "programmed' to be asleep, it causes stress to the system. This in turn can cause physical and even psychological problems.

2. On page 3 of that article there is a discussion of shift differentials. The article concludes, "it is well established that working night shifts becomes more difficult as one ages and increases potential for more errors." The Union argued that "errors" in police work can be very serious indeed, even fatal.

3. Even the physicians and medical experts who drafted this article note that it is common to compensate workers who perform night shift work in order to pay them something to account for the disturbance in their sleep patterns.

4. The Union also cited a CDC article entitled, "Plain Language About Shift Work" that comes to a similar conclusion. The drafters of this article discuss the health risks and difficulties people typically have who perform shift work, especially those performing rotating shift work, as that apparently causes an even greater disruption in sleep patterns. The researchers even found that in Sweden, there was a noted increase in heart disease as the result of shift work.

5. The Union also cited an article by a researcher writing for the Massachusetts Nurses Association who found a correlation between sleep deprivation, fatigue and shift work. The article cited several well-known industrial disasters, such as Three-Mile Island and Bhopal as being directly related to shift work and the fatigue it caused workers. The article supports the notion that shift differentials should be paid in order to compensate workers for this disturbance in their sleep patterns.

6. Finally, the Union cited external comparables and noted that all of the comparable cities determined to be the comparison group for Winona, i.e. Albert Lea, Austin, Faribault, Mankato Northfield and Owatonna have shift differentials of some sort. These vary in amounts and circumstances but they all have them to a certain extent. Winona should for this reason alone.

The Union seeks an award of the language set forth above.

CITY'S POSITION

The City's position is for no change in the labor agreement. In support of this the City made the following contentions:

1. The City argued that there was no showing of a need for such a change much less the compelling showing arbitrators require in order to place brand new language in a labor agreement.

2. The bargaining and arbitration history does not support the claim for new language on shift differentials. The Union has twice before attempted to add shift differential into the labor agreement and on both occasions the arbitrators have refused to do so. See, *LELS and City of Winona*, BMS 92-PN-891 (Bard 1992) and *LELS and City of Winona*, BM 85-PN-782 (1985 Kapsch). Arbitrator Kapsch flatly told the parties "this is an economic issue and should be settled thru the negotiation process on a give and take basis."

3. On that point, the Union has offered no quid pro quo in exchange for the addition of shift differential language. The City argues that it is well established that a party seeking new language must provide compelling reasons for it and offer something in exchange for it. The Union has done neither in this instance.

4. Internally, no other City unit has shift differential except for public works employees.

5. Externally, even though the comparison group cities do offer it, several of them apply only if an officer works a rotating shift. Arbitrator Bard denied the Union's request in 1992 for this reason and it should be denied now. Winona does not work rotating shifts.

6. With regard to the argument on sleep deprivation, the City argued that police work requires shift work; it is a 24-7 operation and officers know this when they take these jobs and chose law enforcement as a career. The Union offered nothing new here and it appears that they are simply attempting to gain now what they twice tried to get before in arbitration without success.

The City seeks an award for no change in the labor agreement on this point.

MEMORANDUM AND DISCUSSION OF SHIFT DIFFERENTIAL

This was frankly a harder issue to determine than it first appeared. Typically it is true that a party seeking to add new language to a labor agreement must provide compelling evidence in support of that change. Typically too, in the give and take of labor negotiations items of economic benefits are sometimes traded for other things.

Here, the Union's first argument was that a differential should be paid to compensate officers for the disruption caused to their sleep patterns and health due to shift work. The articles cited provided some basis for this. However, law enforcement work is work that requires shift work and people entering that profession know that when they chose it as a career. It is also clear that Winona has not had shift differential for these employees so anyone taking a job either knew or clearly should know that this is not a benefit they get when they work for the City of Winona. Whether they should or not is a different matter but suffice it to say that there is no expectation of a shift differential as people enter that position. Accordingly, while the information presented by the Union regarding the health concerns in shift work was an interesting piece it did not provide the sort of evidence on this record necessary to compel the addition of shift differential language in the agreement.

The more difficult evidence came in the internal and external comparisons. Internally while most other City employees do not get shift differential, one unit does. This is apparently paid to a public works group. There was no evidence presented as to how, when or under what circumstances this was added to that contract or how it is paid. Thus, this was not enough on its own to compel the addition of new language.

Typically too an internal comparison of fringe benefits such as this would be the more compelling evidence. Here however, as noted above, the history of these parties in being able to negotiate to agreement has been shown to be difficult at best. Moreover, shift differential is a wage item and is also to be compared to an external market.

The external market shows that the other comparison group cities used in this matter pay shift differential under some circumstances. The amounts vary from $0.12 per hour to $0.75 per hour. The City also argued that Arbitrator Bard denied the Union's request in 1992 largely on the basis that the other cities paid differential for rotating shifts. A review of Arbitrator Bard's decision shows that the Union was requesting shift differential only if the City's request for rotating shift was granted. Since it was not, see slip op at page 14-15 and 21-23, Arbitrator Bard declined to grant the new language. Here the request is for something very different: the Union seeks shift differential largely because literally all of the comparison cities have it and Winona does not.

The City argued that the comparable cities typically pay the shift differential on rotating shift only. A review of the evidence of what the comparison cities pay shows that this is not an accurate statement. Albert Lea pays $0.75 per hour where the shift falls between 5 PM and 5:00 AM. Austin pays either $0.35 per hour if the shift falls on a Sunday and $0.50 per hour for all regularly scheduled hours between 5:00 PM and 7:00 AM. Mankato pays $0.25 where the shift falls between 9:00 PM and 6:00 AM. Owatonna pays a differential for 2nd and 3rd shifts. The amounts vary but it appears that those payments are made based on the shift and are not based on a rotating shift schedule. Northfield pays $35.00 per pay period for all hours worked between 4:00 PM and 6:00 AM.

Only Faribault pays differential for rotating shifts. The officers are paid $21.00 per month if they work rotating shifts between 3:00 PM and 7:00 AM. It should be noted that the Union claimed that the practice of paying shift differential in Faribault was discontinued in 2002 in exchange for an additional $0.30 per hour. The provisions for the 2005-2006 agreement between the City of Faribault and IBT #320 at Article XXXII show otherwise. Based on this record it appears that Faribault still does pay a shift differential based on a rotating shift.

The question is what to do with all this. Externally, there is evidence in support of the additional language. Internally, while it is clear that most employee groups do not receive a shift differential, one group does. It is not entirely clear on this record but certainly is the case, that not all City employees work night shifts and therefore the question of a shift differential is a moot point.

There is some merit to the notion, as stated by Arbitrator Kapsch in 1985 that the parties should negotiate this economic issue. What Arbitrator Kapsch did not know in 1985, nor could he, was the subsequent 20-year history between these parties whereby they were virtually never able to negotiate a labor agreement without resort to interest arbitration.

Moreover, the considerations in 1992 that were before Arbitrator Bard do not apply here either. There the question was whether the City could alter contractual language to allow more flexibility in scheduling. The Union's claim then was tied to the determination of whether it could and would then schedule rotating shifts. Since the City's position on that question was denied, the question of shift differential pay was moot. There was no evidence in either of those prior arbitrations, at least not on this record, as to what the external market was.

Here the evidence is quite different. Typically arbitrators should be hesitant to add an additional economic cost to a labor agreement without compelling evidence in support of that. Typically too, the Union should be able to show that there is some quid pro quo for such a change, especially where there has been such a long history of compensation without that benefit.

It is based on that latter issue that this case turns. Several options were considered. One was to simply add the shift differential at the average of the external comparables. This was rejected, mostly because it was not clear what the economic impact would be to the City with such a result. Interest arbitration is like negotiation in at least one respect in that no language or benefit should be simply added to the agreement without knowing what it costs. Here there was no way to determine that. The option of reducing the wage award slightly to take account of the shift differential was considered as well. This too was rejected because of its speculative nature.

In the final analysis, a shift differential likely is appropriate for these parties. It is justifiable internally and externally. The determination however of how much and under what circumstances cannot be made on this record with a sufficient degree of certainty to render an award based on what the parties would have negotiated. Accordingly the City's position is awarded for no change in the contract. It is clear however that some shift differential should be in this agreement however and, like Arbitrator Kapsch, I too would hope that the parties will figure out a way now to negotiate an agreement without resort to this process in the next round of bargaining.

AWARD ON SHIFT DIFFERENTIAL

The City's position is awarded.

UNIFORM ALLOWANCE – ISSUE #5 - AMOUNT

UNION'S POSITION

The Union seeks an increase of the uniform allowance in Article 22 of an additional $25.00 in 2007, the second year of the contract. In suport of this, the Union made the following contentions:

1. The Union pointed to the increase that is likely in the cost of uniforms in the next few years. It will increase approximately 3% to 5%. See, Union exhibit 297.

2. Currently the City pays $675.00 per year. The 2004-05 contract called for $650.00 per year in 2004 with an increase to $675.00 in 2005. The Union agrees that the allowance should stay the same in 2006 but needs the increase in 2007 in order to keep pace with the increased cost of uniforms.

3. Internally, even though the police receive the same allowance as the sergeants, several of the other agreements have not been settled. Thus there is no internal pattern of settlement on this issue.

The Union seeks an increase as set forth above.

CITY'S POSITION

The City seeks an award for no change in the agreement. In support of this the City made the following contentions:

1. In 3 of the past 4 agreements the uniform allowance was the same over both years of the contract. The City desires that this remain consistent with the other contracts.

2. Internally the police have the same allowance as the sergeants. Moreover, the fire fighters and fire captains receive $390.00 per year and the animal control officers receive $490.00. These officers therefore get a far higher allowance than do other City employees.

3. Externally, the City pays some $31.25 more than the average of the market cities. There is no justification for this increase as Winona is already above the average for 2006. For 2007 the average of the 2 cities with applicable uniform allowance provisions is $675.00, Albert Lea pays $650.00 and Owatonna pays $700.00 yielding an average of $675.00. Again there is no justification to increase the allowance.

The City seeks an award of $675.00 in uniform allowance for both years of the contract.

MEMORANDUM AND DISCUSSION OF UNIFORM ALLOWANCE - AMOUNT

The evidence supports the Union's position on this issue. Internally while the police officers are paid a higher uniform allowance the evidence suggests quite strongly that they have different uniforms. Over time the officers have been paid the same rates in both years in some contracts. For the last contract, the one that the parties were able to negotiate to conclusion, they agreed to pay a different amount in the second year of the contract than in the first. While that alone is not enough to simply increase it, it undercuts the City's claim that there is somehow an historical precedent to pay the same uniform allowance in both years of the contract.

Here the compelling piece of evidence was the increase in cost of the uniform. The evidence showed that the cost of uniforms would increase by 3 to 5 % over the contract term. An increase of $25.00 to $700.00 in 2007 is almost exactly in line with this amount.

Externally, the evidence still supports the Union's claim. First, it should be noted that several of the comparison cities pay 100% of the costs of uniforms irrespective of what they cost. Faribault does and the evidence showed that, in 2005 at least, Northfield did as well. Northfield is not settled for 2006.

Thus the averages externally are not as compelling a piece of evidence as the increased costs here. Moreover, the average may be skewed a bit since some of the comparable cities pay 100% of the uniform and Mankato for example pays an allowance for both uniforms and a weapon.

Here even though this is an economic item the costs are discernable. Moreover the Union's request is in line with the cost increases for uniforms. The City on the other hand provided no compelling evidence in support of its position other than it would cost them more. Accordingly, the Union's position on the amount is awarded. The 2006 uniform allowance is awarded at $675.00 per year and the 2007 allowance is awarded at $700.00.

AWARD ON UNIFORM ALLOWANCE – AMOUNT

Union's position on the amount is awarded. The 2006 uniform allowance is awarded at $675.00 per year and the 2007 allowance is awarded at $700.00.

UNIFORMS ISSUE #5 – CHANGE IN STYLE AND COLOR

UNION'S POSITION

The Union's position is for no change in the existing contract language. More accurately, the Union seeks to continue the existing language but with the addition of only the relevant years. In support of this position the Union made the following contentions:

1. The current language provides in relevant part that "the City will not change the uniform style or color during 2004 or 2005." This was voluntarily negotiated by the City and the Union in the one contract they have been able to voluntarily settle and should continue.

2. Moreover, the Union noted that the City has no current plans to change the uniform style or color so there is no compelling need to change the existing language.

The Union seeks an award keeping the existing language but with the change in years, thus the Union seeks an award amending the last sentence of Article 22 as follows: "The City will not change the uniform style or color during 2006, 2007 or 2008."

CITY'S POSITION

The City seeks a change in the existing language and practice and seeks an award of language to be added to the end of Article 22 in place of the last sentence that is there now. This language is as follows: "The City may, with at least 120 days of notice to the Union, change the uniform style or color." In support of this the City made the following contentions:

1. The City's main argument here is that the current language infringes on the City's right to change uniform styles and color. PELRA grants to public employers the right to direct the workforce. This is clearly a matter of inherent managerial policy and needs to be changed.

2. The City claimed that it recognized the need to provide sufficient time for officers to make the necessary adjustments to their uniforms and to get new ones if the City determines that a change in uniform style or color is necessary. It therefore proposes a reasonable 120-day provision to allow this time.

3. Externally, no other comparison City has a provision limiting the right to change uniform style or color. The City claims that it has therefore provided the sort of compelling evidence of a need to change this provision and that it has an inherent right to change this under PELRA.

The City seeks an award amending the language of Article 22 to allow the City the right to change uniform color or style with 120 days notice to the Union.

MEMORANDUM AND DISCUSSION OF UNIFORM ALLOWANCE – CHANGE IN STYLE AND COLOR

The City's position has greater merit here insofar as it related to the inherent right of a public employer to direct the workforce. Under 179A.07 it is clear that a City has the right to change style and color of police officer uniforms if it believes that is appropriate. If, for example, the Union were seeking to amend this language to provide for this restriction, it would be an easy call to deny that request.

Here though the parties have voluntarily negotiated this language into their contract for reasons that were not fully explored at the hearing. The essential fact is that it is there. The question is whether there is a compelling reason to change it.

Here it appears there is. PELRA, as noted above, does grant discretion to a City to change the uniform its officers wear. Moreover, no other City in the comparison group, and probably few in Minnesota, has such language. Pursuant to M.S. 179A.16, subdivision 7, the arbitrator must "consider the statutory rights and obligations of public employers to efficiently manage and conduct their operation within the legal limitations surrounding the financing of these operations."

Based on that section it is clear that the right of the City to change the uniform should not be fettered by the language in the current agreement. On this record, the City's argument that this provision unduly limits its right to direct its workforce has merit. The language will therefore be changed to reflect that.

The City also proposes a 120-day notice period. This too appears reasonable. There was no evidence to suggest that this is too short a period for the officers to purchase new uniforms.

The final question however, not addressed in the language proposed is an economic one and one that is well within the terms and conditions of employment. That is the question of whether in the event a change is mandated the officers would be expected to pay for the new uniforms out of the allowance granted for uniforms that are now potentially useless. PELRA grants an interest arbitrator certain discretion to arrive at an award that reflects portions of both parties' positions or that reflect something in between or outside of those positions. See, M.S. 179A.16, subdivision 7.

It is also the role of the interest arbitrator to try to craft language that will not create undue hardship or unnecessary disputes between the parties during the life of the agreement, to the extent that can be done anyway. Here it would be manifestly unfair to allow the City to change uniforms mid-term without also providing for some payment to the officers for those new uniforms. Otherwise, one can easily construct a scenario whereby the uniform allowance is paid and the officers purchase uniforms that complied with then current City policy and then having to buy new uniforms later on in the event the City elected to change them. This would place an undue burden on the officers thus affected and essentially render moot the uniform allowance for the balance of that year. They would have, under that scenario, spent their uniform allowance on uniforms they could no longer use.

Thus while it is clear that the language restricting the ability of the City to change the uniform style and color should be changed it is also clear that in the event the City elects to do so it must pay for the cost of new uniforms in the year in which that decision is made. To be clear then this would require the City to pay for the uniforms above and beyond the uniform allowance provided for in the remainder of Article 22.

Accordingly, the final sentence of language of Article 22 is amended to read as follows: "The City may, with 120 days notice to the Union, change the uniform style or color. Notwithstanding the other provisions of this paragraph, in the event the City decides to change the uniform style or color the City shall pay 100% of the new uniform for the first year in which such change is implemented."

AWARD ON UNIFORM ALLOWANCE – CHANGE IN STYLE OR COLOR

The language awarded is as follows: "The City may, with 120 days notice to the Union, change the uniform style or color. Notwithstanding the other provisions of this paragraph, in the event the City decides to change the uniform style or color the City shall pay 100% of the new uniform for the first year in which such change is implemented."

COURT TIME – COURT CANCELLATION – ARTICLE 12 – ISSUE #7

UNION'S POSITION

The Union seeks a change in the final sentence of the existing language of article 12 as follows: "If an employee is scheduled to appear in court and the appearance is cancelled with less than forty eight hours (48) notice, the employee shall receive the two (2) hour minimum." Note that the Union's final position was to pay for 3 hours minimum but this was amended at the hearing to 2 hours.

In support of this position the Union made the following contentions:

1. Currently the Court cancellation provision is to pay for as minimum 2 hours pay if the Court appearance is cancelled "after 4:00 PM one business day prior to the Court appearance. The Union simply seeks to extend the minimum notice period from 4:00 PM on the business day prior to the schedule appearance to 48 hours notice.

2. The Union claims that this minor change should cost the City very little and will provide an additional measure of stability in the officers' schedules by allowing them to know 48 hours in advance. The Union notes that the parties have already begun to address the problem by allowing for 2-hour minimum pay but that this does not go far enough.

3. Internally of course this only affects police officers so there really is not comparable provision for other City workers. Externally, many of the comparison group cities are moving in the direction of a 48-hour notice and Winona should as well. Doing so will allow the officers to make scheduling arrangements for daycare or to compensate them for having to get up in the middle of their "night" which may be the middle of the day if they work a night shift.

The Union seeks an award amending the minimum call out time to 48 hours as set forth above.

CITY'S POSITION

The City seeks an award for no change in the existing language. In support of this the City made the following contentions:

1. The bargaining history and prior awards do not support the Union's position. The City pointed out that this provision was added in 2000 to allow for a 2-hour minimum call out if the officer was notified of the cancellation after 4:00 PM on the business day before the scheduled appearance. There have been no problems with this provision or its implementation.

2. The City argued that Arbitrator Bard in his 1992 award declined to award a similar request that he termed "out of step with the rest of the state."

3. Externally, the other cities do not have this long a court cancellation. The City argued that at most they have a 24-hour cancellation period. None have 48 hours. Internally, no other group has any similar clause.

4. The City also pointed out that Court schedules are out of its control and that they are driven by the District Court and by the prosecuting or defense attorneys over which the City has no control either. All the Union's proposed language would do is to drive up costs for the City.

The City seeks an award for the existing language.

MEMORANDUM AND DISCUSSION OF COURT TIME, COURT CANCELLATION TIME

The City's position on this has merit and will be awarded. The Union was able to provide no compelling reason to change the existing language or practice. The evidence showed that this provision has been in the parties' contracts since 2000 and there was no evidence that there have been significant problems for either party or the affected employees in administering this language.

Moreover, while a longer notice period would potentially cost the City more it may not allow stability if the officers still don't know if they are going to court by 4:00 PM the day before. There is thus some merit to the City's claim that changing this language may not in fact "fix" the problem the Union seeks to repair but will add more cost to this contract.

Externally the evidence showed that no comparison City has a 48-hour notice. Based on these factors the Union has failed to provide a compelling reason to alter the existing language.

AWARD ON COURT TIME COURT CANCELLATION – ARTICLE 12 – ISSUE #7

The City's position is awarded. No change from existing contract language of Article 12.

COMPENSATORY TIME – ISSUE #10 – ARTICLE 10

UNION'S POSITION

The Union seeks to add language to Article 10 as follows: "Once per calendar year, employees may request to exchange compensatory time for cash at the employee's current rate of pay. Denials of the request to exchange compensatory time are not subject to the grievance procedure of Article 32." In support of this position the Union made the following contentions:

1. Currently, officers may bank up to 180 hours of compensatory time but there is no language allowing them to cash this out. This merely provides them an opportunity to exchange accrued comp. time for cash. It is done completely at the City's option.

2. The Union argues that this is a completely innocuous provision and one that is not even subject to the grievance procedure. Moreover, it will cost the City nothing, and may even save the City some money. When a person uses comp time, the City has to cover the shift and may have to pay overtime to do so. Here, if the employee takes the cash, the City has no additional shift to cover. There is thus no compounding of overtime.

The Union seeks an award of this language set forth above.

CITY'S POSITION

The City objected to the proposed change and seeks an award for no change in the existing language. Existing language does not call for any exchange of comp. time for cash. In support of this position the City made the following contentions:

1. The City argues that this matter is not arbitrable pursuant to M.S. 179A.16, subdivision 5. This was not included in the Employer's final positions and is not a term and condition of employment.

2. The issue of exchanging comp. time for cash is not a term or condition of employment. The Union concedes this by stating that the matter is not grievable. Under M.S. 179A.07 subdivision 1, the question of whether the employees may exchange time for cash is a matter of inherent managerial policy.

3. No other internal unit has had this clause in the past and no arbitration has granted it despite the long and rich history of such arbitrations between these parties.

4. The essence of the City's argument is that this is not arbitrable; it is a matter of inherent managerial discretion under PELRA and should not even be discussed. Moreover, there is no bargaining or negotiation history, arbitration precedent or other internal or external precedent to compel this result sought by the Union.

The City seeks an award for no change in existing language.

MEMORANDUM AND DISCUSSION OF COMPENSATORY TIME – ARTICLE 10

The question of whether this is inarbitrable seems to be a matter more for the BMS or the Courts to determine. The City cited no particular precedent for the proposition that this is inarbitrable other than the very general language of M.S. 179A.07, subdivision 1. It is clear however that this item was not a part of the employer's final positions certified by BMS.

Here the question appears to be moot as there was a recognition by the Union that the matter is not grievable anyway. Further, the Union provided no compelling reason to change existing language. While it may be a good idea to allow this at the Employer's discretion, and in fact it may be to avoid the compounding of comp. time problem that occasionally plagues public employers, it is not necessarily the role of the arbitrator to simply implement something that may be a good idea where there is no compelling reason to change an existing practice.

There was no such evidence presented here to compel a change. Accordingly, the award is to retain the existing language.

AWARD ON COMPENSATORY TIME – ARTICLE 10

The City's position is awarded. No change from existing language.

RECOGNITION – ARTICLE 1 – ISSUE #11

UNION'S POSITION

The Union seeks an award of no change in existing contract language. In support of this the Union made the following contentions:

1. The language the City seeks to add is unnecessary; there have been no problems or concerns that have arisen over this language. There is therefore, to use the phrase the City is so fond of using, no compelling reason to change this language.

2. Moreover Arbitrator Wallin similarly rejected the same proposal in 1997 stating that this is a "structural change without sufficient evidentiary support." The Union argued that the City has attempted this before without success and that this arbitrator should not be swayed by the "same old, same old" arguments here.

The Union seeks an award retaining the existing language.

CITY'S POSITION

The City seeks an addition to the existing recognition language as follows: All other City of Winona employees are excluded from this Agreement, unless otherwise agreed to in writing by the Employer and Union, or unless otherwise ordered by the Bureau of Mediation Services pursuant to a unit determination order made in accordance with Minnesota Statutes, 179A." In support of this position the City made the following contentions:

1. This language will do nothing more than clarify which employees are in the appropriate unit consistent with the BMS certification of the unit and with Minnesota Law.

2. Internally, the public works employees agreed to this language and the City is proposing similar language for the sergeants.

3. Externally, 4 of the comparison cities have virtually identical language. There have been no problems reported with this new language there.

The City seeks an award adding the new language to article 1.

MEMORANDUM AND DISCUSSION OF RECOGNITION – ARTICLE 1

The City showed no evidence as to why it needed this change. Any issue with regard to unit certification can by law be made to BMS. That is already covered by statute and there is frankly no need for this language in the parties' labor agreement. It was further not clear why the public works unit agreed to this language. Moreover, this was apparently raised by the City before Arbitrator Wallin and was rejected as noted above. His analysis appears to be as cogent today as it was then and is adopted herein. Finally, there was no evidence of a problem with the existing language that would compel this change. Accordingly, the Union's position is awarded.

AWARD ON RECOGNITION – ARTICLE 1 – ISSUE #11

The Union's position is awarded. No change in existing contract language.

RIGHTS AND PRIVILEGES AND WORKING CONDITIONS – ARTICLE 4 – ISSUE #12

UNION'S POSITION

The Union seeks an award of no change in the existing language. In support of this position the Union made the following contentions.

1. The Union vehemently opposed these changes. The Union argued that, contrary to the City's view, these are very substantive changes and amount to no more than a bald faced attempt to alter the structural relationship between these parties without having to adopt a quid prop quo for such a sweeping change. The Union argued that this is in effect a radical alteration of what is a maintenance of benefits clause.

2. The City has attempted to change this in the past and has used the same argument in the past to do so. Prior arbitrators have rejected these. Both Arbitrator Kapsch and Bergquist have rejected this same argument and have found no compelling reason or rationale presented by the City that this language unduly infringes on the inherent right to run the City.

The Union seeks an award for no change in the existing language.

CITY'S POSITION

The City proposed to add language to existing Article 4 as follows: (proposed changes are underlined)

> Section 4.1. All written rights, privileges and working conditions, <u>that may be considered terms and conditions of employment pursuant to Minnesota Statutes, Chapter 179A, and</u> other than those protected under ARTICLE 5 EMPLOYER RIGHTS and Chapter 179A enjoyed by the employees at the present time which are not included in this AGREEMENT shall remain in full force and effect, unchanged in any manner, during the term of this AGREEMENT unless changed by mutual consent of the EMPLOYER and the UNION, or such rights and/or privileges are altered by virtue of State or Federal legislation. If such rights and/or privileges are altered by enactment of State or Federal legislation, such changes shall supersede applicable provisions of this AGREEMENT.
>
> A. The UNION agrees that its member shall comply with all police department rules and regulations, including those relating to conduct and work performance <u>as such rules and regulations may from time to time be amended</u>.
>
> B. Rules and regulations in effect and not inconsistent with the terms of this AGREEMENT as of the date of this AGREEMENT, shall become part of this AGREEMENT <u>consistent with Minnesota Statutes 179A</u>. New rules, or changes in rules <u>relating to terms and conditions of employment as defined in Minnesota Statutes 179A</u> other than those covered under <u>Article 5 – Employer Rights or statutes or common law</u>, shall be instituted only through mutual consent during the term of this AGREEMENT of the EMPLOYER and the UNION.

In support of these proposed changes the City made the following contentions:

1. The City argued that the current language unduly infringes on the management right to change or establish rights, privileges, working conditions, rules and regulations that are not considered terms and conditions of employment.

2. M.S. 179A.07 provides that a public employer is not required to negotiate matters that are not terms and conditions of employment nor is it required to negotiate matters of inherent managerial policy. Any provision therefore that restricts that right is in contravention of PELRA.

3. Here the City argues that the City must get the Union's consent prior to establishing or changing working rules or regulations. PELRA clearly does not require this of the Employer.

4. The City thus claims that the arbitrator must grant its language or the language will be in conflict with PELRA, since it currently requires such consent of the Union.

5. Only the firefighters have the same sort of language in their agreements internally and externally, none of the other units have anything remotely like this.

The City seeks an award amending Article 4 with the underlined changes listed above.

MEMORANDUM AND DISCUSSION OF RIGHTS AND PRIVILEGES AND WORKING CONDITIONS – ARTICLE 4

The Union's arguments are far more persuasive here than are the City's. This language has been a part of the agreements for some time and was included as a part of the voluntarily negotiated settlement the parties were able to reach for 2004 and 2005. The evidence and arguments show here too that this is nothing more than an attempt by the City to get out from underneath a voluntarily negotiated maintenance of benefits clause. There is nothing inherently illegal about such a clause.

PELRA does not prohibit a public employer and a Union from negotiating the language found in this contract, just as they apparently did for the 2004 and 2005 contracts. Further, there is nothing in PELRA that prohibits an interest arbitrator from leaving such language in an existing contract, just as Arbitrators Kapsch and Bergquist did in their respective arbitrations with these parties.

Arbitrator Bergquist's statements are particularly relevant here. He noted as follows: "… the reasonable interpretation would be that past practices which may be found to involve non-mandatory subjects of bargaining or areas which are inextricably interwoven with management rights as defined by PELRA in 179A.07, subd. 1, are within 'other than those covered under management rights' as contained in the first full paragraph of Article 4 and (B) of Article 4 and are thus excluded from this provision and within the rights of management." LELS and City of Winona, BMS 90-PN-33 (Bergquist 1991) slip op at pages 28-29. It is of some note that as far back as 1990 the City made the same arguments using the same rationale that Arbitrator Bergquist rejected as they are now. It is also of some significance that this provision was apparently voluntarily negotiated into the agreement, presumably for some sort of quid pro quo, even prior to the Bergquist award and was again negotiated into the 2004 and 2005 agreement.

PELRA certainly does provide that a public employer is not required to negotiate matters of inherent managerial policy. It does not however prevent it. See, 179A.01 subd 19, terms and condition of employment include personnel policies affecting the working conditions of employees. Moreover, the language in this matter does not appear to run afoul of the provisions of 179A.07, subdivision 1. Finally, there is nothing in the language that appears to run afoul of the provisions of 179A.16 subdivision 5 either. This is nothing more than a maintenance of benefits clause voluntarily negotiated by and between the parties apparently initially and again in the latest round of bargaining.

Moreover, the language of the current agreement does not appear to have the adverse effect the City claims it does. Paragraph A of Article 4.1 requires only that the members comply with all department rules and regulations.

The language in the first paragraph of Article 4 specifically exempts any rights contained in Article 5 Management rights. Thus the City cannot point to how this language unduly restricts its rights under PELRA or the labor agreement.

In addition, while Paragraph B of Article 4 requires the consent of both parties before new rules are instituted, it too refers to the management rights article. Simply stated, the City has not provided sufficient evidence that this language somehow violates PELRA.

Further, the City provided no evidence of a problem with this language and the fact that some of the other units internally have different language does not in and of itself compel a change in it.

Similarly, external comparisons on language like this are of very little probative value. Thus, external comparisons are not determinative of this issue.

The essential feature of this language is that the parties negotiated their way into it and they will have to negotiate their way out of it. On this record there was simply an insufficient showing of a compelling reason to warrant such a change. The Union's position is awarded.

RIGHTS AND PRIVILEGES AND WORKING CONDITIONS – ARTICLE 4

The Union's position is awarded. No change in existing contract language.

EMPLOYER RIGHTS – ARTICLE 5 – ISSUE #13

UNION'S POSITION

The Union's position is for no change in the current agreement. In support of this the Union made the following contentions:

1. The existing language has been in the agreement for many contract terms and that there have been no issues, problems or concerns about it. The City has therefore not made any showing, much less a compelling showing, of a need to change this language.

2. The net effect of the City's change would again radically alter the relationship between these parties and would in effect be to turn the bargaining unit employees into "at-will" employees of the City.

3. Finally, this ploy has been used by the City in the past and rejected in the past by other arbitrators. See *LELS and City of Winona*, BMS # 88-PN-693 (1989 Bard). The City used virtually the same argument then as they are now and it should be similarly rejected.

The Union requests an award for no change in the existing language.

CITY'S POSITION

The City proposes to change the current language as follows:

Section 5.1. The EMPLOYER retains the full and unrestricted right to assign, direct, operate and manage all manpower, facilities and equipment; to direct, plan and control City operations and services; to establish functions and programs; to make and enforce reasonable rules and regulations; to establish work schedules and assign overtime, to contract with vendors or others for good or services; to hire, recall transfer, promote, demote, suspend, discipline and discharge employees for good and sufficient reason' to lay off employees because of lack of work or for other legitimate reasons; to introduce new and improved operating methods and/or facilities; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to perform any inherent managerial function not specifically limited by this AGREEMENT.

Section 5.2. The foregoing enumeration of the Employer's authority shall not be deemed to exclude any other inherent management rights and management functions not expressly delegated in this Agreement and not in violation of the laws of the State of Minnesota. Any term and condition of employment not explicitly established by this AGREEMENT shall remain with the EMPLOYER TO establish, modify or eliminate. (Proposed changes are underlined).

In support of these proposed changes the City made the following contentions:

1. The City used a recent decision in Austin to justify these changes here and argued that there was just as much in support of the City's changes there as here.

2. Internally most of the other units have this language. The City did note that the net effect of these changes were to place employees on notice that they would enable the City to unilaterally make changes in such matters as shifts and to ensure that there will be no further disputes about it.

3. Externally, the City argued that most other cities have very strong employer rights language enabling the comparison cities to make these types of unilateral changes without interference by the Union or the employees.

MEMORANDUM AND DISCUSSION OF EMPLOYER RIGHTS – ARTICLE 5 – ISSUE #13

The City has again failed to show a compelling need for these changes. Existing language was negotiated by these parties only a few years ago and was apparently originally voluntarily negotiated by these parties.

Moreover, there was some merit to the Union's claim that making these changes would essentially be "stealth" changes and that the City's intent is to make fairly sweeping changes in several things within the City that could greatly affect the employee's working conditions. There was no direct evidence on this point but it would appear that when analyzing this along with the other proposals made by the City that this is quite likely if such language were to be placed in the agreement.

The City argues that similar language was placed in the Austin contract recently. There were other factors at work in that matter however that distinguish this matter from that presented in Austin. The Union did not raise as strong an objection to the placement of that language in Austin and there were several other differences in that agreement and that relationship. Thus, the mere fact that a similar clause was placed in another City's agreement does not compel that this must be done here.

Similarly, the external comparisons are of lesser value than the factor of whether the party proposing the change can make a compelling case for the change of long-standing language in an existing agreement. Here no such showing was made. Accordingly, the Union's position is awarded.

AWARD ON EMPLOYER RIGHTS – ARTICLE 5 – ISSUE #13

The Union's position is awarded.

SHIFTS – DEFINE SHIFTS AND SHIFT CHANGES – ARTICLE 21 – ISSUE #14

UNION'S POSITION

The Union's position was for no change in the existing language of the contract. In support of this position the Union made the following contentions:

1. That the City is again requesting a radical change in the contract and in the relationship that has existed between these parties for many years. The Union argued that as with several other issues invoked in this matter, the City has failed entirely to show any need at all for the requested change much less the compelling need for such a change that arbitrators typically require.

2. The Union pointed to several prior arbitrations before Arbitrators, Wallin in 1996, Kapsch in 1989 and Bergquist in 1991 all of whom denied the City's request on this very same issue. Each cited the need to provide compelling evidence of a need for this change and each found that none existed.

3. The Union argued that the City is merely making the same arguments on the same issue in the same way it has for years without any evidence of a need for a change and that this arbitrator, as the arbitrators who have dealt with this in the past, should come to the same result and deny the City's request.

The Union requests an award denying the City's requested change in this language and for an award of no change in the existing contract language.

CITY'S POSITION

The City requested a change in the agreement as follows:

Section 21.1. *The UNION recognizes the necessity of providing service twenty-four (24) hours per day, seven (7) days per week and that a reasonable condition of employment is a requirement that employees work a regular schedule of hours as established by the EMPLOYER. Regular schedules shall not be construed as excluding shift rotations and emergency work schedules based on public necessity as determined by the EMPLOYER.*

Section 21.2. The current procedure of scheduling shift, with days referred to as 6 days on 3 days off, and permanent shift hours of 6:30 a.m. – 3:00 p.m., 2:30 p.m. – 11:00 p.m., and 10:30 p.m. – 7:00 a.m., and supplemental shift hours of 6:30 p.m. – 3:00 a.m., shall remain in effect for police officers assigned to the patrol division, and shall remain in effect for the term of this AGREEMENT. Any proposed change, if not found to be acceptable to the members of the UNION, shall be subject to review in accordance with the grievance procedure herein established. The foregoing agreement shall become invalid if, as the result of State or federal legislation such shift arrangements must be altered. Persons assigned to shifts shall be by seniority. No shift will be rotated during the term of this AGREEMENT.

21.3 (To remain the same as in current language

Section 21.4. The EMPLOYER agrees to provide notice to employees of changes in shifts at least thirty (30) days in advance whenever possible. The EMPLOYER reserves the right to change shifts immediately in the event of an emergency. Employees may temporarily transfer or exchange shifts with permission of the Chief. The Chief's determination of shift is final. Assignment to shifts will not be done for disciplinary purposes.

Proposed new language is highlighted with italics. Proposed deletions are noted as underlined.

In support of these changes the City made the following contentions:

1. It is well recognized that employers have the inherent right to establish or change shifts in order to meet the needs of the operation. This clause is unduly restrictive and creates problems for the department in scheduling officers to meet the changing needs of law enforcement within the City.

2. The Sergeants contract has language allowing the City to designate shifts. In addition, the City fire groups have also agreed to allow temporary changes in shifts. The City argues that the trend in the City is in the direction of allowing the City to designate and change shifts as needed.

3. Externally, none of the comparison cities have language that restricts the ability of the department to change shifts in an emergency. Indeed, none have restrictions on changing shifts at all. Moreover, most of the comparison cities have language allowing the City to establish shifts.

4. The City argues that since shifts are based on seniority, senior officers bid on more desirable shifts thus creating a lack of expertise for junior officers who typically work less desirable shifts. Junior officers thus lose the opportunity to learn from senior officers on the same shift.

5. The current schedule is too rigid and can cost the City more money when it has to staff for special events. This results in increased overtime costs as well as scheduling problems in general.

6. Emergencies are even a more compelling reason according to the City. No other City has such restrictive language and when emergencies arise the City must meet it and that under the current system is burdensome and expensive. The City thus argued that it has provided a compelling need to alter this language to give it the flexibility it needs to meet its needs.

The City requested an award requiring the changes set forth above.

MEMORANDUM AND DISCUSSION OF SHIFT CHANGES – ARTICLE 21

This item presented a much closer call than others involved in this matter. The City argued that the right to schedule shifts is an inherent part of the right to select and direct the workforce. This argument has merit and is tempered only by the fact that they apparently negotiated that away at some point. It was not shown what the quid pro quo was in exchange for this.

The initial question is thus whether the City has shown by compelling evidence the need to change this language at this point. The essential feature of the City's argument on this point was that it needs flexibility to deal with increased needs in demand for law enforcement. However, it was not forgotten in this portion of the case that earlier, in the wage portion of this matter, the City argued that the need calls for service have decreased dramatically. This dichotomy undercut the validity of the City's argument considerably. Moreover, there was no evidence of any instance in which the language has created a sufficiently grave problem that it warranted such a radical change in the language at this point.

Second, and significantly, a party requesting such a major change in the existing relationship should also show that there was some quid pro quo for the change. Here there was no such showing. The City simply desires the change presumably not to make it easier to schedule shifts but also to avoid paying overtime costs when it is necessary to call officers in to cover special or extraordinary events and situations.

Third, other arbitrators have dealt with this very same issue and have denied the City's request based apparently on the very same arguments both parties are making now. Arbitrator Wallin's comments in 1997 are particularly applicable. In his decision he noted as follows:

> The Employer's proposal is found to constitute a structural change without sufficient evidentiary support. Article 17 (now 21) currently provides for fixed shifts of 6 days on and 3 days off with fixed hours. This arrangement dates from 1986 when, according to evidence, it was implemented at the Employer's request. A similar proposal to delete the Article was rejected by several prior interest arbitrators. There was no evidence of changed circumstances since that series of awards that would warrant a deletion at this time. To the contrary, the Union witness testified that the parties have been able to negotiated deviations from the fixed pattern in appropriate circumstances. See Slip op. at page 16.

These comments appear as applicable now as they did nearly ten years ago. Once again, it was of some significance that this arrangement, similar to the employee's choice of the insurance plan they selected, was implemented at the behest of the City. The City is now simply attempting to change it without offering anything in exchange for it. On these facts there is simply not enough to warrant such a change.

If the issue was reversed and the Union were proposing the language currently in the agreement in place of the language the City now proposes that would not likely be ordered absent some compelling piece of evidence.

AWARD ON SHIFT CHANGES – ARTICLE 21

The Union's position is awarded; no change from existing language.

GRIEVANCE PROCEDURE – ARTICLE 32 – (NEW) – CHOICE OF REMEDY – ISSUE #15

UNION'S POSITION

The Union's position is that this is not arbitrable and that even if the arbitrator reaches the merits the Union's position for no change in the existing agreement should be awarded. In support of this position the Union made the following contentions:

1. The City is seeking to change the grievance procedure by adding an election of remedies clause. The Union argued that pursuant to 179A.20 subdivision 4, since the parties cannot agree on a procedure there is therefore no procedure and the arbitrator must therefore award the statutory procedure found in PELRA at section 179A.04, subdivision 3, clause (h). .

2. Moreover, this is just another of those items the City has been trying to change for years without success. Other arbitrators have faced this one as well and have rejected the City's request.

3. The Union argued finally that the agreement has never had an election of remedies clause and to add one now would constitute a radical change in the relationship without any evidence of a need for it and nothing offered in exchange for it.

The Union seeks an award for no change in existing language.

CITY'S POSITION

The City proposes sweeping changes in the current grievance procedure that in summary would provide for an election of remedies in certain disciplinary matters. If the employee elects to pursue a remedy in any other forum than the grievance procedure called for in the labor agreement the employee would have waived the right to pursue such a grievance. In support of this position the City made the following contentions:

1. The matter is arbitrable under 179A.16, subdivision 5. the statute calls for a matter to be determined by an interest arbitrator if that item was certified by the BMS or it is included in the Employer's final position. Here the matter was included in the final position and it was certified as an issue for determination by BMS. Thus, the arbitrator has jurisdiction to determine the issue.

2. On the merits, the City argued that the sergeants now have the language it proposed calling for the election of remedies.

3. The City also argues that such a procedure would prevent an aggrieved employee from having "two bites at the apple" by pursuing a grievance in a second forum after losing in the first one.

The City seeks an award for the election of remedies language set forth in its final position to the BMS.

MEMORANDUM AND DISCUSSION GRIEVANCE PROCEDURE – (NEW) – CHOICE OF REMEDY

Arbitrability. The Union argues that pursuant to 179.20 subdivision 4, the arbitrator must simply award the statutory grievance procedure set forth in that statute since the parties cannot agree on the grievance procedure to be used. That statute provides in relevant part as follows: "If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subdivision 3, clause (h).

The Union argued that since the parties cannot now agree on a grievance procedure the clear language of the statute compels that the grievance procedure set forth in 179A.04 must be implemented.

The City on the other hand pointed to 179A.16 subdivision 5 that simply says that the arbitrator has jurisdiction over the items of dispute certified to and submitted by the commissioner. Moreover, that section also provides that the arbitrator has no authority to determine a matter or issue which is not a term or condition of employment "unless the matter or issue was included in the employer's final position."

Here the matter is clearly arbitrable. The matter was certified by BMS as an issue in dispute pursuant to the Commissioner's letter dated February 15, 2006. As such the arbitrator must determine all issues so certified. 179A.16 subdivision 7 requires that the "decision [of the arbitrator] must resolve the issues in dispute between the parties as submitted by the commissioner."

Merits. Here the Union's argument appears to have considerable merit for several reasons. First, as noted above, BMS certified this issue as in dispute pursuant to PELRA. It follows therefore that the parties cannot agree on a grievance procedure. The clear language of 179A.20 cited above calls for the implementation of the statutory grievance procedure called for in section 179A.04, subdivision 3, clause (h).

Second, there was no evidence at all to support the City's claim for changing the grievance procedure and it was not shown why the sergeants agreed to this. The change requested is in essence a waiver of the statutorily guaranteed rights to redress matters set forth in other parts of Minnesota law. The City offered no evidence as to any problems in this regard or why such a sweeping change in the structural relationship should be awarded.

Third, other arbitrators have faced this issue as well, a recurring theme in this case, and have rejected the City's arguments for many of the same reasons cited here. Arbitrator Bard came to a similar conclusion in the 1988 interest arbitration between the parties. His analysis applies here as well.

Finally, an external comparison on an item like this is unusual at best and perhaps even inapplicable. There was no evidence whatsoever as to why certain cities have the grievance procedures in their agreements with comparable units and none will be presumed here. It is also not known what the history of such clauses were and what if anything was negotiated as the result of placing such a clause into those labor agreements.

Accordingly, for reasons set forth above. The Union's position is awarded and the statutory grievance procedure set forth in section 179A.04, subdivision 3, clause (h) is awarded.

AWARD ON GRIEVANCE PROCEDURE – ARTICLE 32 – (NEW) – CHOICE OF REMEDY ISSUE #15

The Union's position is awarded and the statutory grievance procedure set forth in section 179A.04, subdivision 3, clause (h) is awarded.

WAIVER CLAUSE – ISSUE #16

UNION'S POSITION

The Union's position is for no change in the labor agreement. In support of this position the Union made the following contentions:

1. The Union argued that there has never been a waiver clause in the agreement and the City has provided no evidence, much less "compelling" evidence, as to why one should be added.

2. The Union also argued that a waive clause, sometimes called a zipper clause, effectively precludes any bargaining over matters that arise during the life of the agreement. These parties have been able to do that in the past and the Union does not agree to waive that right. The City is merely trying to avoid its obligation to negotiate in good faith with the Union when disputes arise over terms and conditions of employment.

The Union seeks an award denying the City proposed changes.

CITY'S POSITION

The City proposes to add language set forth in its final position to BMS and at page 434 of its arbitration book. This is a comprehensive "zipper" clause that affirms the City's management rights and affirms that those rights are not restricted by any prior practices that may have existed before the negotiation of the agreement. In support of this position the City made the following contentions:

1. Other units within the City have similar clauses that affirm the City's management rights. The City argues that it needs this language to affirm that anything not expressly in the labor agreement is therefore not a restriction on the City's inherent management rights and that only those items expressly in the labor agreement place any restriction whatsoever on that right.

2. Externally, several comparison cities have such clauses. No problems have been reported by the Union's in those cities as the result of the inclusion of those clauses there.

The City seeks an award adding its proposed language in the agreement.

MEMORANDUM AND DISCUSSION OF WAIVER CLAUSE

The City offered little evidence of a compelling reason this should be placed in the agreement. Certainly they want it to radically alter the nature of the relationship that has arisen over the year. However, no evidence of problems in terms of the number or nature of grievances filed was offered nor was there any compelling evidence of the need of this clause.

As noted herein several times, no quid pro quo was offered in exchange for this. Internally one other unit has a similar clause but there was no evidence offered as to how that was placed there.

Finally, for the reason set forth in the discussion of issue #15, an external comparison of this issue on the facts does not provide sufficiently compelling evidence of the need for the insertion of new language that would have the net effect of drastically changing the nature of this relationship. Accordingly, the Union's position is awarded.

AWARD WAIVER CLAUSE

The Union's position is awarded.

SUMMARY OF AWARD

- **AWARD ON WAGES FOR 2006 AND 2007**

The award is for an increase in wage rates of 3.25% in 2006 and a 3.25% increase for 2007.

- **AWARD ON HEALTH INSURANCE**

"For 2006, the employer will contribute to each employee covered by this Agreement $331.00 per month for employees selecting single coverage and $929.00 per month for employees selecting dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage or, an amount equal to that established for the other City of Winona employees whichever is greater."

"For 2007, the Employer will contribute to each employee participating in the Union-designated plan $331.00 per month for employees selecting single coverage and $929.00 per month for employees selecting dependent coverage or, an amount equal to the cost of the lowest plan option of the City-designated insurance plan(s) for single or dependent coverage, or an amount equal to that established for any other City of Winona employees, whichever is greater."

Notwithstanding the foregoing, in no event shall the City's contribution to the Union designated insurance plan exceed the total monthly premium payment for an employee participating in the Union designated insurance plan."

- **AWARD ON SHIFT DIFFERENTIAL**

The City's position is awarded.

- **AWARD ON UNIFORM ALLOWANCE – AMOUNT**

Union's position on the amount is awarded. The 2006 uniform allowance is awarded at $675.00 per year and the 2007 allowance is awarded at $700.00.

- **AWARD ON UNIFORM ALLOWANCE – CHANGE IN STYLE OR COLOR**

The language awarded is as follows: "The City may, with 120 days notice to the Union, change the uniform style or color. Notwithstanding the other provisions of this paragraph, in the event the City decides to change the uniform style or color the City shall pay 100% of the new uniform for the first year in which such change is implemented."

- **AWARD ON COURT TIME COURT CANCELLATION – ARTICLE 12**

The City's position is awarded. No change from existing contract language of Article 12.

- **AWARD ON COMPENSATORY TIME – ARTICLE 10**

The City's position is awarded. No change from existing language.

- **RIGHTS AND PRIVILEGES AND WORKING CONDITIONS – ARTICLE 4**

The Union's position is awarded. No change in existing contract language

- **AWARD ON EMPLOYER RIGHTS – ARTICLE 5 – ISSUE #13**

The Union's position is awarded; no change from existing language.

- **AWARD ON SHIFT CHANGES – ARTICLE 21**

The Union's position is awarded; no change from existing language.

- **AWARD ON GRIEVANCE PROCEDURE – ARTICLE 32 – (NEW) – CHOICE OF REMEDY ISSUE #15**

The Union's position is awarded and the statutory grievance procedure set forth in section 179A.04, subdivision 3, clause (h) is awarded.

- **AWARD WAIVER CLAUSE**

The Union's position is awarded; no change from existing language.

Dated: October 6, 2006

_____

Jeffrey W. Jacobs, arbitrator

Winona and LELS.doc

JEFFREY W. JACOBS
ARBITRATOR

ONE CORPORATE CENTER III
7300 METRO BOULEVARD
SUITE 300
EDINA, MN 55439

TELEPHONE: 952-897-1707
FAX: 952-897-3534
E-MAIL: jjacobs@wilkersonhegna.com

January 18, 2007

Mr. Kenneth Pilcher
LELS
327 York Ave.
St. Paul, MN 55101

Mr. Christopher Hood
Hood and Flaherty
525 Park St.
Suite 470
St. Paul, MN 55103

RE: LELS and City of Winona
BMS Case # 06-PN-0650

Dear Mr. Pilcher and Mr. Hood:

I am in receipt of the City's Motion for Clarification, Correction or Modification of Award, the Union's Response to that and the City's Reply to that.

The City asks that the arbitrator correct, modify and/or clarify the award with respect to the Award regarding Issue 15 listed on the Certification Letter from BMS dated February 15, 2006. The City argued that the arbitrator did not have jurisdiction to render the award on the entire grievance procedure issue since the entire grievance procedure was not certified as an issue by BMS.

Further, the City argued that it did not place the entire grievance procedure in issue pursuant to M.S. 179A.16 (5). The City argues that the choice of remedies was all it sought to have changed in the overall grievance procedure and never sought to change the whole thing.

The City also contends that there is no statutory authority to award the statutory grievance procedure since the statute provides that the parties are subject to the statutory grievance procedure only "*if the parties cannot agree on the grievance procedure*." See, M.S. 179A.20 Subd. (4) (Emphasis added). The City argued that this provision contemplates the situation where the parties have never had a collective bargaining agreement and cannot agree on a grievance procedure or where there is no grievance procedure in the contract between parties who have an existing relationship. The City further argued that these parties have in fact agreed to a grievance procedure since they already have one in the prior contract. All the City wanted was to add a provision to it. Therefore, the City argued, the terms of M.S. 179A.20 do not strictly apply here.

The City argued that there may be a chilling effect on future negotiations if the award is allowed to stand since a party might well run the risk of placing the entire grievance procedure in issue if it seeks to change only one small portion of it.

The Union asserted that the award was clear and that the arbitrator had jurisdiction to award the statutory grievance procedure. Indeed, on these facts, the arbitrator was mandated to do so since an issue with regard to the grievance procedure was certified by BMS and since the parties were not able to agree on one. Moreover, as the Union asserted at the hearing, the statutory grievance procedure was awarded in a prior arbitration between these same two parties under nearly identical circumstances. There the arbitrator awarded the statutory grievance procedure as well.

I struggled with this issue when it was first presented and have struggled with it again now. Initially, I was persuaded by the claim that since there was no agreement on one portion of the grievance procedure the parties thus "cannot agree on a grievance procedure," to use the words of the statute.

Moreover, Arbitrator Bard's 1989 Award on this very issue showed the somewhat dichotomous nature of the City's position here. In 1989, the City apparently claimed that there was no agreement on the grievance procedure, even though the parties had one in the existing agreement at that time, and that the "default" procedure in PELRA should be used. Arbitrator Bard awarded the default procedure. There was no evidence that his award was appealed or that there was any subsequent proceeding regarding it.

BMS rules did not provide a crystal clear answer either on whether the terms of M.S. 179.20 are to be applied only on a first contract situation or was intended to go beyond that. At this point there is no clear pronouncement on this question.

Arbitrators should obviously avoid flip-flopping on awards and I am loath to change a ruling after it has been made if for no other reason than to preserve the sanctity of the arbitral process itself. On the other hand, neither should an arbitrator be oblivious to the need to modify an award on a largely legal point if it appears there are good grounds to do so or where it appears that the question was limited in some way by the statutory process from which interest arbitration derives its very jurisdiction.

In life I have found that wisdom all too often never comes; one must not to reject it merely because it comes late. It was clear that there was jurisdiction to determine the issue that was certified by BMS since the City raised it in its final positions and because the issue of choice of remedy, Article 34.7, was certified. See, M.S. 179A.16. The Union's final position as stated to BMS was that the matter was not arbitrable pursuant to M.S. 179A.20. The argument both in oral presentation at the hearing as well as in the Briefs was whether jurisdiction existed to render an award at all. The Bureau did not however certify the entire grievance procedure at issue even though the Union did seek to have that awarded at the hearing. BMS certified the question of whether there should be added a new provision regarding choice of remedy.

In determining that the matter was arbitrable it was clear that the statute required a ruling on the issue of arbitral authority. The Union is correct in that the award was clear in that regard; the issue now is whether it was correct. Jurisdiction is an issue that can be raised at any point in the proceeding. If there is no jurisdiction no award can be rendered on that point. It is also clear that the Uniform Arbitration Act provides for a process to review an award to make certain that jurisdiction was properly placed and exercised.

Upon further reflection, and based on these new arguments raised by the City at this point, it is apparent that BMS did not intend to certify the entire grievance procedure as an item at impasse. Simply stated, despite the Union's claim that the provisions of the M.S. 179A.20, subd. 4 compel the arbitrator to render an award for the statutory grievance procedure; the BMS did not certify that as an issue at impasse. An interest arbitrator's award must determine all such issues certified as "at impasse" but cannot go beyond that.

The argument raised by the Union regarding the language of M.S. 179A.20 subd. 4 gave the arbitrator great pause here. The Union argued that since there was no agreement on the one provision of the grievance procedure there was no agreement on any part of the grievance procedure. Thus the entire procedure was placed in issue and the provisions of 179A.20 apply.

The City argued that the language providing "If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subd. 3(h)" was only intended to apply to a first contract or one which has no grievance procedure. That may well be people's assumptions but that is not what the statute says. This however, is a question of statutory interpretation best left to the Courts to determine. It may well take that in order to bring finality to the question of what authority does an interest arbitrator have to award the entire "default" procedure where there is a dispute about or a request to change a part of the grievance procedure by one party.

At the hearing the City did not raise the argument regarding the possible chilling effect it might have on negotiations if the entire procedure were to be placed in issue under these circumstances. This argument does have some cogency. If the entire procedure is placed in issue under these circumstances, thus invoking the provisions of 179A.20, one party would need only to place a small portion of the procedure in issue and in all cases the "default" procedure would have to be awarded. The net effect could thus very well be to mandate the default procedure being awarded all the time.

The jurisdiction of an interest arbitrator under M.S. 179A.16 is as follows: "The arbitrator or panel selected by the parties has jurisdiction over the items of dispute certified to and submitted by the commissioner." Here BMS only certified the question of whether to add a choice of remedy clause to the grievance procedure. It is on this basis that the original decision should have gone forward. Having determined that jurisdiction was lacking due to the limited issue certified by BMS, it is unnecessary to reach the other arguments raised in the City's Motion.

Here the City's request for modification of the award must be granted since the sole issue certified by BMS was the question of whether there should be added a new choice of remedy clause.

Turning to that matter, the City's position to add this found little support on the merits. There was no compelling reason to award such a change in the contract for the reasons stated in the original Award. Accordingly, the award remains the same in that the Union's position is awarded but is modified to delete the reference to the substitution of the statutory grievance procedure.

The Award on this question is thus modified as follows: The Union's position is awarded; no change from existing language.

Very truly yours,

Jeffrey W. Jacobs

JWJ:fsj
cc: BMS

Arbltr.jwj